UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States
Department of Housing and Urban
Development, on behalf of
Ronnie L. Kelly,

Charging Party,

v.

Willie L. Williams,

Respondent.

HUDALJ 02-89-0459-1
Issued: March 22, 1991

Thomas A. O'Keefe, Esquire
For the Respondent

David H. Enzel, Esquire, and
Jane Shinn O'Leary, Esquire
For the Secretary

Before: Robert A. Andretta
Administrative Law Judge

INITIAL DECISION

Jurisdiction and Procedure

This matter arose as a result of a complaint filed by Ronnie L. Kelly ("Complainant"), alleging that he had been denied rental accommodation, by being forced to surrender his room in a rooming house, on the basis of his handicap, Acquired Immune Deficiency Syndrome ("AIDS"), in violation of the Fair Housing Act, 42 U.S.C. Sections 3601, *et seq*., as amended by the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1626 (1988) ("Fair Housing Act" or "Act"). This matter is adjudicated in accordance with section 3612(b) of the Act and the regulations of the Department of Housing and Urban Development ("HUD") that are codified at 24 CFR Part 104, and jurisdiction is thereby obtained.

On April 13, 1990, following an investigation of the allegations and a determination that reasonable cause existed to believe that a discriminatory housing practice had taken place, HUD's General Counsel issued a Determination Of Reasonable Cause And Charge Of Discrimination against Willie L. Williams ("Respondent"), alleging that he had engaged in discriminatory practices against Complainant on the basis of the latter's handicap in violation of sections 804(c), (f)(1), (f)(2) and 818 of the Fair Housing Act. A hearing was conducted on August 13 and 14, 1990, in White Plains, New York. Post-hearing briefs were submitted by the Secretary of HUD, on behalf of Complainant, and Respondent, and were accepted into the record on November 16, 1990, and January 22, 1991, respectively.[1] Thus, this case became ripe for decision on this last named date.

Findings of Fact and Applicable Law

A. Willie L. Williams

Throughout all times relevant to this proceeding, Respondent Willie L. Williams has been the sole owner of the three-story house that is the subject of this proceeding and is located at 1100 Howard Street, Peekskill, New York. (T 449).[2] Williams does not live in the house but has rented its two apartments and three partially-furnished rooms, with shared bathroom, for approximately the past 15 years. (D 59, 63). The renting of the apartments and rooms at the house is very informal, with no written leases. (D 98-105). Respondent's principal concern is whether or not tenants can pay their rent. (D 98). All rental agreements are oral except for one that involves a federally-subsidized tenant. (D 113-14). There are no written rules or regulations of the house, but Respondent requires that tenants pay their rent on time, refrain from playing loud music, have no big parties, and generally take good care of his property. (D 117-20). Respondent owns a second house next door to the subject house. It contains two apartments which Respondent rents in the same manner. (T 320-21).

Respondent resides with his wife and two minor children in Fishkill, New York, which is approximately 18 miles from the subject house. (D 6, 10). He has been employed by the General Motors Corporation as a new car driver for approximately 25 years. (D 16, 20). He keeps a master key to the rental rooms which he uses to gain access in emergencies or when asked by a tenant. (T 71-72). Complainant's room contains the master control for bleeding air out of the building's heating system, and Respondent must occasionally do so to maintain heat in the house. (D 214). Respondent generally visits

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[1] The Secretary filed a Motion to Refuse Submission and Consideration of Respondent's Post-hearing Brief on December 19, 1990. In that Motion, the Secretary argued, *inter alia*, that Respondent filed his brief untimely by 11 days without requesting an enlargement of time in which to file that brief. Pursuant to an Order issued on January 22, 1991, the Secretary's Motion was denied. As stated in that Order, although simultaneous filing of briefs was intended, the Secretary had not demonstrated that Respondent had the opportunity to benefit from receipt of the Secretary's brief prior to filing his brief. Moreover, the Secretary could have, but had not, sought to respond to any statements made by Respondent as a result of that advantage by filing a Motion for Leave to File a Supplemental Brief.

[2] Capital letter T stands for the transcript of the trial, and the number refers to the transcript page. The Secretary's exhibits are cited with a capital S and an exhibit number, and the Respondent's exhibits are cited with a capital R and an exhibit number. Capital letter D, with a page number, refers to the Deposition of Respondent, which was taken on June 20 and 21, 1990, and was admitted into evidence by stipulation of the parties' counsel. (T 446-47).

the house on a daily basis in the late afternoon on his way home from work. (T 91, 93). Williams's wife and children help Williams clean and maintain in and around the house; the children clean the shared bathroom on the third floor. (T 325; D 67-71).

B. **Ronnie L. Kelly**

Complainant, Ronnie L. Kelly, is a 40-year-old male infected with Human Immunodeficiency Virus ("HIV") and diagnosed as having AIDS. (T 40-47, 197-98, 275, 278-82, 421). He has also been diagnosed as having meningitis, herpes, candiasis, and diffuse infiltrated lymphocytotic syndrome. (T 41-43). The meningitis was diagnosed in March 1988, and led to the diagnosis of his having AIDS. (T 44). He was treated for the disease by Dr. Jeffrey Jacobson at the Bronx Veterans Administration ("V.A.") Hospital.[3] (T 44). Dr. Jacobson continues to treat Kelly with zidovudine ("AZT") to retard the progression of AIDS, fluconazole to reduce the chance of meningitis relapse, acyclovir to help fight the herpes, and pentamidine to prevent the occurrence of pneumocystis pneumonia. (T 47-48, 276-78). During all times relevant to this case, Kelly has also been treated by a psychiatrist for, according to Kelly, "negative behavior" and an inability to cope with life's pressures. (T 157-90). His illnesses have adversely affected his ability to work. (T 47).

Prior to moving to the subject house in February 1989, Kelly lived for approximately 16 months at a drug rehabilitation half-way house at the V.A. Hospital, Montrose, New York. (T 49-50). Prior to that, he had lived in at least two other drug rehabilitation centers for "many years". (T 131-32). Kelly was hospitalized for drug addiction and related problems during the 16-month period immediately preceding his move to Peekskill. (T 135-40). Kelly described himself as a "garbage feeder," which means that he used whatever drugs he could get, including alcohol and cocaine. (T 51). He admits to having been a drug addict since at least 1974, and further, that he could not keep himself off drugs. (T 50-51, 131).

In November 1988, Kelly was told about Respondent's rooming house by Joe Brown, who lived there and was a member of Kelly's drug and alcohol rehabilitation group. (T 48, 49; D 196, 212). The house is near Montrose V.A. Hospital where Kelly was then living. (T 52). Kelly went to the house to see it and met Respondent, but there were no vacancies at that time. (D 205-206). Williams knew Mr. Brown and Kelly were in a drug rehabilitation program. (D 190, 196-97, 211-12). In February 1989, Williams informed Kelly that a room was available. The rent for a room on the third floor, with shared bath, was $270 per month, due on the first of each month, and Kelly was required to pay two months' rent plus a security deposit of $150. (T 55, D 223). There was no written lease, and no written rules or regulations of the house

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[3] Dr. Jacobson is a graduate of Cornell University and Cornell Medical College, and completed an internship at the University of Wisconsin Hospital and a residency in internal medicine at Mt. Sinai Medical Center in New York. Dr. Jacobson has been the chief of the Infectious Disease Section of the Bronx V.A. Hospital since 1981. He is the chairman of the hospital's Infection Control Committee, a member of the Medical Executive Committee, and a member of the Clinical Executive Court of the hospital. As of the hearing date, he was the president-elect of the Medical Staff. Dr. Jacobson is an Assistant Professor of Medicine at Mt. Sinai School of Medicine, is a member of the Infectious Disease Society of America and the American Society of Microbiology, and is the head of the Bronx V.A. subunit of the Mt. Sinai AIDS clinical trials unit under the National Institutes of Health (NIH) AIDS clinical trials group. During the past decade, Dr. Jacobson has treated at least 800 to 900 patients with HIV infection. (T 254-58, 261). Accordingly, Dr. Jacobson was accepted as an expert on HIV infection and AIDS at the hearing. (T 262).

were shown to him. (D 116, 122). Respondent asked Kelly if he worked and could afford the rent, and Kelly said that he was employed and could pay. (T 208). Complainant was told that there was to be no cooking and that he would be required to clean the shared bathroom after each use. (D 209-10). Before moving in, Kelly volunteered to Williams that he was sick and sometimes hospitalized, but stated that his illness was rheumatic fever. (D 208, 218-20). Kelly agreed to the rental and moved into a room on the third floor of Respondent's house in February 1989. (T 54, 57). When Kelly moved in, Williams warned him against any drug use in the house. (D 209).

According to Dr. Jay Buckiewicz, a psychologist and the Director of the Montrose halfway house, by the time Kelly moved into Respondent's rooming house, Kelly had successfully completed the program and had made "remarkable progress" in spite of the difficult problems associated with his health. (T 197-98). He had become a "model" for other residents in the program, and was ready to move out on his own.[4] (T 198). Initially, Kelly had a cordial relationship with Williams, and he was pleased to be living near his friends and support groups. (T 53, 56, 97, 109).

At the time Kelly moved into the subject house, his income was derived from a job in West Yorktown, New York, which paid him an amount not in evidence, a monthly social security disability check of $468 per month, and $14 worth of food stamps per month. (T 56, 140-41). He also had "some savings". (T 56). In May 1989, Kelly lost his job in West Yorktown because he was sick and unable to work. He was unemployed until he got his present job at the Montrose V.A. Hospital in October 1989. (T 52, 56, 140).

C. **Complainant's Tenancy**

Within a week of his having moved into the house, other tenants began to complain about Kelly's behavior. (T 282). Some told Williams that they would move out if Kelly did not discontinue flooding the bathroom and other parts of the house. (D 384). Most of the complaints from other tenants had to do with flooding the bathroom and causing water to run down into the rooms below. (D 283, 290). On or about April 27, 1989, Kelly allowed the bathtub to overflow, and water came into the kitchen of the apartment on the second floor. (T 63-64). Kelly admitted he was bathing when the tub overflowed, but denied that it caused the damage to the apartment below. (T 64). Another tenant named Laura Barber complained in April that Kelly allowed water to overflow the bathtub and drip into her kitchen. (T 131). Kelly also admitted to Williams that he had taken a shower and had left the curtain outside the tub, so that water ran down to the floor below. (D 133). In July and August, Respondent received complaints from a tenant named Jesse Robinson concerning additional flooding of the bathroom. (D 280-81).

When Williams confronted Kelly about the numerous complaints of water left running, Kelly did not deny that he was responsible. Instead, he claimed that other people in the house were picking on him. (T 294). When Williams would try to speak to Kelly about complaints, Kelly would "cut him off" because he believed his landlord was only trying to get him out of the house. (T 166). Kelly refused to pay the $50 for

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[4] The Montrose halfway program requires that all its residents attend Alcoholics Anonymous ("AA") or Narcotics Anonymous ("NA") meetings in the community. AA and NA are self-help groups which support recovering alcoholics and addicts to remain drug and alcohol free. Such support is considered essential for former residents of the halfway program after they move out into the community. Kelly continued to attend these meetings after he left Montrose. (T 53, 193, 209-10).

the ceiling damage that was demanded by Williams sometime after April 1989, although he himself agreed that there was damage to the ceiling caused by water leakage. (T 183). To "repair" that ceiling, Williams administered a skim of plaster.[5] (T 384, 387, 389).

More flooding and more damage occurred after the "repair" of the ceiling. (D 295, 297). Kelly admitted to Respondent that he had caused the flooding. (D 303-304). During September or October 1989, which was at or about the time that Williams initiated eviction proceedings against Kelly which are discussed below, tenant Robinson told Williams that Kelly was intentionally flooding the house by leaving the upstairs sink to overflow with the water running, and that she had had to shut the water off herself at least five or six times. (D 291, 310). When Williams went to the house to investigate, he tried to talk to Kelly about it, but Kelly refused to talk about it; he was "in a rage", and claimed again that the other tenants were picking on him. (D 311).

On a number of occasions, Kelly overloaded electrical circuits in his room which would blow the fuse and cause a black out. (T 165). He does not understand how use of too many appliances at one time can do this, and believes that his landlord was turning off the power to his room. (T 166-68). In another incident, a tenant named Mr. Newkirk called Williams to complain that Kelly had spilled his garbage down the interior stairs of the house and had left it there. (D 148-50). It included rancid fish that gave off an odor. (D 158). Kelly admitted to spilling the garbage and apologized to Respondent for the incident, stating that it was an accident. (D 155, 158). Kelly also nailed a television antenna to the side of the house. It "hung loose" over the sidewalk, and caused a safety hazard. (D 333-34).

For the first few months of Kelly's tenancy he paid the $270 monthly rent on or about the first of each month. (T 244). On at least one occasion he allowed Williams to go into his unoccupied room to collect the rent that had been left for him there. (T 244, 268). This was a common means of rent collection at the house. (T 271). During the entire tenancy, Respondent and Complainant saw each other infrequently, not more than two or three times per month. (T 245). Having lost his job in May 1989, Kelly could not pay his June rent on time. After being told by Williams that he could do so, Kelly paid part of it on June 9th and the balance, plus a late charge, on July 4th. (T 238; S 7g, 7h). Kelly never paid the rent for September and October 1989. (T 328-29). When Williams asked Kelly for the September rent, Kelly laughed at him. (T 162-63). Nonetheless, Williams agreed to wait for the rent until September 12th. (T 163). Kelly considered Williams's requests for the rent to be a form of harassment. (T 168).

On September 15, 1989, Williams sent notice to Kelly, on a form of the type available at legal supply stores, that he must surrender the premises by October 31, 1989, or face proceedings to remove him. (T 150-51; S 15).[6] On October 4, 1989, Williams gave notice to Kelly, also by standardized form, that he must pay the $540 in back rent that was then owed for September and October, within three days, or

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[5] Given the amount of repairs done by Williams, a skim of plaster, $50 would appear excessive. However, it is unknown whether Williams intended to undertake more extensive repairs had he been paid the money for the damage.

[6] Except for two other tenants which Williams evicted for nonpayment of rent, Williams has not taken steps to evict any other tenants. (D 122-28). One of those tenants, Stanley McCrae, was evicted in 1986 or 1987. (D 122-23). The other tenant, Joe Brown, was evicted in October 1989. (D 125-26).

surrender the premises, under threat of court proceedings. (S 16). A hearing on the two matters was set for October 20, 1989, in the Peekskill City Court, and Kelly was sent notice of the date and the matters to be adjudicated. (S 17). Kelly appeared in court *pro se* and asked for a trial. The judge told Kelly that he might have a case against Williams and that he would keep the case open for trial if Kelly paid the outstanding rent to the court, to be held in escrow pending the outcome. (T 113, 151). Kelly declined and vacated the premises on or about October 22, 1989. (T 152). Thus, it was not necessary for Williams to pursue the matter of eviction.

D. **HIV Infection and AIDS**

AIDS is the end stage of a syndrome caused by the HIV virus.[7] (T 262). The HIV virus, among other things, attacks the human immune system and sharply reduces its effectiveness. (T 262). The virus mainly attacks CD4 lymphocytes called helper, or T4, cells, and another type of cell line called monocytes or macrophages. These cells are referred to as monocytes when circulating in the blood stream; they are referred to as macrophages when they are outside the blood stream in tissue. (T 262-64). As a victim's immune system is diminished by the virus, he becomes more susceptible than someone without the infection to developing opportunistic infections, rare cancers, and other diseases that are manifestations of the syndrome. (T 262). The virus can infect most parts of the body. (T 264). According to Dr. Jacobson, nearly all, if not all, patients infected by the virus will ultimately develop some manifestations of the disease.[8] (T 263, 294).

There are various stages of the infection and the clinical diagnosis of AIDS is made when a patient develops an opportunistic disease as a result of his impaired immune system, on the average, five to ten years after becoming infected. (T 263, 266).[9] Examples of such opportunistic infections include pneumocystis pneumonia, cryptococcal manigitis, disseminated herpes infections, candida infection, disseminated megalovirus, cancers, and other neoplasms. (T 263-65). Some of the recognizable symptoms of a person with HIV infection are weight loss, unexplained fevers, chronic diarrhea, coughing, shortness of breath, and various manifestations of specific diseases. (T 265). The level of impairment of the immune system is measured by the presence of circulating T4 helper lymphocytes; when their level drops below 500, treatment with AZT is recommended. (T 269).

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[7] Since the V in HIV stands for virus it is actually redundant to say HIV virus. Nonetheless, it is a handy form of nomenclature.

[8] This view that "almost all if not all" persons infected with the virus will develop AIDS is based on the trend that, according to Dr. Jacobson, has developed during the last 10 or 11 years. (T 294). A study on that same issue has been conducted for a number of years by the San Francisco Department of Health. It involves a group of HIV-infected men who had blood samples taken in the late 1970s and who have been followed ever since. One goal of the study is to enable projection of what happens over time to infected people. At the seven-year point, one-third of the men had AIDS. At the ten-year point about 50 percent had AIDS and another 30 percent had AIDS-Related Complex, or ARC. Thus, after ten years, 20 percent of the men remained well and the "hope, of course, is that there will be a group of people who will never become sick." *See* Jaffe, M.D., *What Doctors Want to Tell Judges About AIDS,* 29 The Judges' Journal 8, 11 (Spring 1990).

[9] Dr. Jacobson testified that the term AIDS is less clinically relevant today than when the medical profession first became aware of the syndrome and knew little about it. Thus, the terms AIDS, as currently used, means that the infected person has actually developed an infection as a result of an impaired immune system. (T 263).

AIDS is a fatal disease for which there is no cure. (T 266). However, many of the manifestations of HIV-infection are treatable. For example, AZT inhibits the replication of the virus, has been shown to prolong life, and reduces the immediate likelihood of developing an opportunistic infection. (T 267). As their immune systems become more impaired, patients can be treated with other medications to help stave off specific infections such as pneumocystic pneumonia. (T 267). As a practical matter, people with HIV infection should bolster their immune systems by staying active, eating well, taking vitamins, and avoiding drugs, alcohol, tobacco, and stress. (T 269).

AIDS is transmitted by the inoculation or transfusion of blood products contaminated by the virus, sexual contact, and perinatal contact. (T 270). There is no other known route for the transmission of AIDS.[10] Scientific studies conducted to determine the likelihood of transmission of the virus through household contact have yielded no indication that such transmission can occur. In those studies, household contact included such actions as sharing toothbrushes, razors, towels, and toilets. (T 295).[11] The virus is very fragile outside the human system and cannot live long outside of a human's body. (T 295). AIDS also cannot be transmitted through such casual contact as coughing, touching, sneezing, or handling ordinary garbage; thus the ordinary contacts made at home and in the workplace cannot lead to HIV transmission from one person to another. However, a needle used by a person infected with the virus, hidden in garbage, could stick an uninfected person and cause HIV infection. (T 272).

Dr. Jacobson testified that the Bronx V.A. Hospital follows nationally accepted guidelines known as "universal precautions" which were established by the U.S. Center for Disease Control ("CDC"). These guidelines, which the CDC "started pushing" in 1987, call for precautions in the handling of blood products and other bodily secretions of all persons because various viruses can be spread by them. (T 272-73). Accordingly, it does not treat HIV patients any differently than any other patients. HIV patients there, and at other hospitals that practice the universal precautions, share rooms and bathrooms with other patients and are not identified in any special manner to reflect their HIV-infected status. (T 273).

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[10] Dr. Jacobson testified that in spite of HIV infection's being relatively new to the medical profession, there is probably more known about the virus than any other organism and more known about AIDS than any other disease. Consequently, reasoned medical opinion is satisfied with what is presently known about the transmission of the virus, and that area is no longer a focus of research. Rather, resources available to AIDS research are being spent on questions of prevention and treatment. (T 296). Despite the doctor's having been accepted as an expert witness, I cannot accept the first two statements, which may have been overstated in an attempt to make his point. That is to say, *e.g.*, there cannot be more known about HIV than about other protists, or other animals, and certainly not more than about the human organism itself. Further, it is obvious even to the layman that, while ever more about AIDS seems to be getting learned at a quick pace, much more must be known about other highly studied diseases, such as cancer, over which the medical profession now enjoys some success. Nonetheless, I do find that resources available to AIDS research are concentrated on prevention and treatment rather than transmission.

[11] There is a chance, however remote, that infected blood products could be transmitted from one person to another by sharing a toothbrush or razor very soon after the first person's use. As Dr. Jacobson testified, it is possible that a person could become infected with the HIV virus if a razor used by another person already infected with the virus nicked the skin of the uninfected person. (T 294-95). Thus, although Dr. Jacobson testified that there have been no known incidents of such transmission, and the occurrence of such transmission is "extremely unlikely", he could not say "zero risk" exists. (T 295).

E. **Respondent's Calls and Notes**

Near the end of March 1989, Respondent received a telephone call from an unknown party who told Respondent that Kelly has AIDS. (D 247-48). Soon thereafter, Respondent's wife, Sadie Williams, called Complainant. (T 58, 328-29). When Kelly answered, she told him that Respondent wanted to speak with him. (T 58, 328-29). Respondent then got on the telephone and asked Kelly about his health. Although he did not directly ask Kelly whether he has AIDS, he told Kelly that he had heard that Kelly has AIDS. (T 59, 330, 332-33).[12] Respondent did not state to Kelly that he posed a danger to others in the house, nor did he state that he wanted Kelly to leave. (T 337). Respondent admitted that he had telephoned Complainant to inquire about Complainant's condition. (T 330-37; D 264). Respondent was "embarrassed" and "reluctant" to make the phone call and stated that it took him a week to "get up the nerve" to do it. (T 335; D 258). In that conversation Complainant denied having AIDS and hung up on the Respondent. (T 59, 331, 336, 422; D 264).[13]

Kelly had never told Respondent about his disease and believed that it was not something that the Respondent should know about him. (T 60). The day before the phone call described above, Kelly overheard Respondent's wife telling Respondent that he was sick, but it was not until the phone call that he came to believe that the Williamses were concerned about his health. (T 60). This knowledge, and the phone call itself, made him angry and upset; he believed that his privacy had been invaded and he felt rejected. (T 60). Kelly perceived that his prior good relationship with Respondent had changed and that Respondent from then onwards wanted him out of the house. (T 61).[14]

Williams's wife, Sadie, was concerned about Kelly's condition. Some time in the Spring of 1989, she asked Laura Barber whether she knew that Kelly has AIDS. (T 391). According to Barber, the question was couched in a way that expressed fear of the situation. (T 395). Mrs. Williams's main concern was for her children's health since they helped with the cleaning of the house, including the cleaning of the shared bathroom on the top floor.[15] (T 331; D 373-74). Respondent had less concern than his wife and did not

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[12] The Government maintains that Williams asked if Kelly has AIDS rather than only stating that he had heard it was so. However, at the hearing, Williams forcefully asserted that he merely stated that he had heard Kelly has AIDS and was willing to accept Kelly's denial. Notwithstanding this semantic argument, I find that Williams made the inquiry because he had reason to suspect that Kelly has AIDS.

[13] Complainant testified that he responded, "What is [sic] you talking about?" (T 59). Williams testified that Kelly's response was, "Who told you that lie?" (T 331, 336; D 263-264). In either case, I take the response to be a denial, and find that Williams understood it to be a denial.

[14] When asked why he felt rejected and why he believed that his landlord wanted him out of the house as a result of the phone call, Kelly responded that he felt that way because of the notes from Williams and the "extra money" that Williams started charging him. (T 61-63). These notes, however, all came well after the phone call. The only "extra money" in evidence was the $50 demanded for repair of the ceiling in a note dated April 27, 1989. This was a month after the call, and the late charge for nonpayment of the June rent was paid in July, also well after the phone call.

[15] Complainant testified that Respondent also expressed concern for the other tenants. (T 59). Respondent, however, did not mention the health and safety of the tenants in testifying as to the concerns which prompted the phone call. (T 331, 337). Accordingly, I find that the primary motivation for the call was Mrs. Williams's concern for the children's health and safety.

believe that AIDS could be spread through casual contact. (D 373-76).[16] He stated, for example, that while his wife would not want to send the children to school with a schoolmate who has AIDS, he would not be afraid of doing so. (D 374).[17] Sadie Williams is not a party in this case.

On April 3, 1989, Kelly visited Dr. Buckiewicz for a therapy session. (T 60, 201). He showed the doctor a note that he said he had received at the house because he was upset over it and its implications. This note was not available to be offered into the record,[18] but Dr. Buckiewicz quoted it, in part, on his Medical Record sheet for the visit as saying, "You got AIDS and we are tired of picking up your garbage." (S 9). The doctor testified that the note also contained other comments that he did not specifically recall but that he remembers to have had a hostile tone. Kelly told the doctor that he planned to complain to the police about Williams, and the doctor advised him to seek other housing so as to avoid stress. (T 203-04). Dr. Buckiewicz also advised Kelly to keep the note. (T 205).

The next note that Respondent received concerned the damage to the ceiling.[19] It accuses Kelly of causing damage to the house by letting water run over in the third floor bathroom. (T 63; S 1). The note was written by Sadie Williams.[20] Respondent left 15 other notes for Kelly after inquiring whether he has

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[16] Respondent is aware that the persons at risk for contracting AIDS include "drug users, the homosexuals, anybody have intercourse with somebody who have AIDS." (D 365). Furthermore, Respondent believes a person could get AIDS from sharing a razor with an infected person based on his understanding that AIDS can be transmitted by being stuck with an infected needle. (D 368-69). Finally, Respondent is aware that persons with AIDS can die from the disease. (D 370).

[17] In response to the Government's questions, Williams testified that his wife might not send the children to school with a person who has AIDS because:

> ... my wife is afraid of cough, any kind of cold that somebody else might have that the kids can catch it, a virus, or if you got a cough, or he got a runny nose, she got a runny nose. She think the kids can catch any kind of disease. And also she feel vulnerable to any kind of disease that comes along. I guess you could call me stupid. I don't think I can catch nothing.

He also responded that he would shake hands with a person with AIDS and would kiss his wife on the lips if she had the disease. (D 373-75).

[18] The record contains no explanation for the nonproduction of the original note. As discussed later, since the original was not produced, it is not possible to determine whether it was authored by Williams.

[19] The Government claims that this note was written and sent "at the end of April". However, the note is not dated and, rather, states that the bathtub overflowed on April 27, 1989. Other testimony indicates that this note was more likely to have been sent in May or even later. (T 67-68).

[20] Kelly believed that this note, Secretary's Exhibit One, came from Respondent (T 63), and the Government asserted that it was written by Respondent. Indeed, the Government attempted to have Respondent admit to having written all the notes offered into evidence. However, I have determined that a difference in handwriting demonstrates that at least Secretary's Exhibits One and Five were written by Sadie Williams, although Exhibit Five was signed by Respondent. (T 337-51, 370). Willie Williams's signature on a certified mail receipt (S 12) and Sadie Williams's signature on another certified mail receipt (S 13) show conclusively which of the two wrote each note.

AIDS, including 10 which were rent receipts.[21]

[21] Kelly and the Government claim that Respondent left at least "ten to fifteen" other notes for Kelly after learning he has AIDS. Including Secretary's Exhibit One, sixteen "notes" were offered into evidence, and none of them had to do with Kelly's condition. As stated above, most of them were rent receipts. The notes offered into evidence are poorly written on scraps of paper and include scratch-outs. They are quoted here without the use of "sic":

S 1, written and signed by Sadie Williams, using her husband's name:

1100 Howard Street
Peekskill, N.Y.
10566 To Ronnie Kelly
This is What it Cost to repair a damaged Ceiling 50.00 on april 27/89 you Let Bathtub Run over for 30 min and the Ceiling on the 2 floor is Water Damaged. I Want this Payment this Month because the Ceiling Will have to be repaired. W. Williams

S 2, written and signed by Willie Williams:

KeLLV I WAnT YoU OUT MY house noW I AM Goning In YouR Room now. Williams

S 3, written and signed by Willie Williams:

KeLLy you ArE LOOK For A PLAce STAY I AM TAke you money Don't PLAY STUP WiTh me[.] Williams[.] IF YOU Don't I AM PUT you ouT I Don't cAre Who you GO see W-W[.] P.S. You no WhAT I am TALK about[.]

S 4, written by Willie Williams:

Kelly Bylaw you must Pay Your Rene for Sep1/89[.] You Say you noT more Pay your Rent[.] I Will Pick it up 9/12/89[.] 270 w[.] [missing word due to tear in page] 2:Pm[.] no more Water come DoWn or We are Going To WAR. OK

S 5, written by Sadie Williams and signed by Willie Williams:

9/16/89 To Ronnie Kelly
Kelly this is your last time to pay your rent before You go And You Know Where and Who give you permission to hang that shit on the side Off my house[.] Williams

S 6, is written by Willie Williams and is nearly unintelligible, but is believed to say:

I am going have you Put on the Sawalk[.] Telly that to Mr. Polic? If you DO Any more DumG I Will HAVE Some Look For You[.]

S 7a-7j are rent receipts.

In addition, the Government's contention that there were other notes that Kelly didn't save "because he did not know they would be helpful later on" is not plausible in view of his having saved some notes, and because Dr. Buckiewicz advised him to save one note. (T 71). Thus, in view of this and Williams's denial of having written any other notes, I find that there were no notes given to Kelly by Williams other than the ones mentioned. (T 351).

After making the phone call in which he inquired if Kelly has AIDS, Respondent continued entering Kelly's room without permission, and did so at least six or seven times. (T 93-96). Kelly could tell Williams had been in his room because he could recognize the smell of Respondent's chewing tobacco and because Respondent would leave him notes. (T 94). When Kelly asked Williams to stop going into his room without permission, Respondent said that it was his house and he could go anywhere he wanted to go. (T 95). Kelly was frightened by Respondent's coming into his room because he was afraid Respondent might tamper with his medications. (T 96, 207).[22] Williams also routinely entered other rooms and apartments in the house without gaining specific permission each time. (T 397-98).

On September 4, 1989, Kelly attempted to file a discrimination complaint at the City of Peekskill Police Department but was told that the police do not handle such complaints. (T 180). On September 10, 1989, after talking with members and the counselor of his HIV support group, and a Legal Aid attorney, Kelly filed a complaint of harassment with the police. (T 304; S 19). Patrolman James DeLuccia was assigned to come in from patrol to handle the matter and met Kelly at the Police Department's headquarters. (T 306). After speaking with Kelly, the two men went to the rooming house to speak with Williams, which they did. (T 307).

DeLuccia found Williams to be "highly agitated" and "belligerent", and "advised him that he should, if he was having a problem with Mr. Kelly that he should take it through legal channels and have him removed that way as opposed to harassing him ...." (T 308). Kelly did not want DeLuccia to follow up on the complaint; he only wanted a police officer to speak with Williams. (T 315-16). Through these events, DeLuccia was under the impression that Kelly was current on his rent since Kelly told him that he had paid the September rent. (T 316). Patrolman DeLuccia did not follow up on the incident because he did not hear any further from the parties and believed that the situation had been cleared up or that Kelly had moved. (T 310).

Kelly received his first notice to vacate the rooming house on September 15, 1989. (S 15). After talking to a Legal Aid attorney and "someone from HUD" on September 20, 1989, Kelly filed the housing discrimination complaint with HUD that resulted in this proceeding. (T 180-81; S 8). On October 23, 1989, he moved out of the premises. (T 152).

F. **Applicable Law**

On September 13, 1988, Congress amended the Fair Housing Act to prohibit housing practices that discriminate against persons with handicaps as well as other categories of people not germane to this case. 42 U.S.C. Sec. 3601-19 (1988).[23] The purpose of the amendments dealing with handicapped

[22] Although the Government asserts that interference with Kelly's medications could have had life-threatening consequences, it never offered any evidence, or claimed, that Williams had actually tampered with the medications. (T 96, 276-77).

[23] March 12, 1989, was the effective date of the Fair Housing Amendments Acts of 1988, Pub. L. No. 100-430, 102 Stat. 1626 (1988).

persons is to extend the principles of equal housing opportunity to handicapped persons who, like other classes of persons already protected by the Act, have been victims of unfair and discriminatory housing practices. H. Rep. No. 711, 100th Cong. 2d Sess. 13 (1988) ("House Report").

In amending the Act, Congress recognized that people with handicaps had been "denied housing because of misperceptions, ignorance, and outright prejudice." *Id*. at 18. Congress further stated, with particular reference to persons with handicaps, that:

> The Fair Housing Amendements [sic] Act, like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

Id. (footnote omitted).

The definition of handicap under the Fair Housing Act, which is codified at 42 U.S.C. Sec. 3602(h), is substantially the same as the definition of handicap under section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Sec. 701, *et seq.* (1988), and was intended by Congress to be interpreted in a manner consistent with the regulations clarifying the meaning of the similar provisions under section 504. House Report at 22; *see also* 24 CFR Ch. I, Subch. A, App. I at 577 (1990) (*citing* legislative history). "Handicap" means, with respect to a person:

> (1) a physical or mental impairment which substantially limits one or more of such person's major life activities;
>
> (2) a record of having such an impairment; or
>
> (3) being regarded as having such an impairment,
>
> but such term does not include current, illegal use of or addiction to a controlled substance as defined in [section 102 of the Controlled Substances Act (21 U.S.C. 802)].

42 U.S.C. Sec. 3602(h).

According to the House Report at 17, the Act also adopts concepts of section 504 which were codified at 29 U.S.C. Sec. 794 to protect handicapped persons from some forms of discrimination in federally assisted programs. Section 504 provides, in pertinent part, that:

> No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap,

> be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance ....[24]

29 U.S.C. Sec. 794(a).

HUD implemented the Fair Housing Amendments Act of 1988 by publishing a final rule in the Federal Register of January 23, 1989 (Vol. 24, No. 13), which codifies HUD's regulations in Title 24 of the Code of Federal Regulations, effective March 12, 1989. These regulations include the same prohibitions of discrimination against handicapped people in matters of housing as does the Act. The specific prohibitions cited by the Government in its Complaint on behalf of Kelly are paraphrased as follows:

1. It is unlawful to discriminate in the rental, or otherwise make unavailable or deny, a dwelling to any renter because of that renter's handicap. 42 U.S.C. Sec. 3604(f)(1); 24 CFR 100.202(a) (1989).

2. It is unlawful to discriminate against any person because of his handicap in the terms, conditions, or privileges of rental of a dwelling. 42 U.S.C. Sec. 3604(f)(2); 24 CFR 100.202(b) (1989).

3. It is unlawful to make, print, or publish, or cause to be made, printed, or published any notice or statement with respect to the rental of a dwelling that indicates any preference, limitation, or discrimination based on handicap, or an intention to make any preference, limitation or discrimination. 42 U.S.C. Sec. 3604(c). These prohibitions apply to all written or oral notices or statements by a person engaged in the rental of a dwelling. The notices and statements include using words or phrases which convey that dwellings are not available to a particular group of persons because of handicap and expressing to other persons a preference for or limitation on any renter because of a handicap. 24 CFR 100.75(b) and (c)(1), (2) (1989).

4. It is unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of any right granted or protected by sections 803, 804, 805, or 806 of this title. 42 U.S.C. Sec. 3617. Prohibited actions include coercing a person, either orally, in writing, or by other means, to deny or limit the benefits provided that person in connection with the rental of a dwelling because of handicap, and threatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the handicap of such persons. 24 CFR 100.400(c)(1), (2) (1989).

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[24] Section 706(8)(B) defines "individual with handicaps" as any person who "(i) has a physical or mental disability which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. Sec. 706(8)(B).

Discussion

A. Persons With AIDS or HIV Infection Have a Handicap Within the Meaning of the Fair Housing Act, as Amended.

It is clear from the legislative history of the 1988 amendments to the Fair Housing Act that Congress intended to include persons with AIDS or HIV infection among handicapped people protected by the Act. In citing examples of handicapped people who have been discriminated against in housing because of their handicaps, Congress stated:

> People with Acquired Immune Deficiency Syndrome (AIDS) and people who test positive for the AIDS virus have been evicted because of an erroneous belief that they pose a health risk to others. All these groups [including people who use wheelchairs, people with visual and hearing impairments and people with mental retardation] have experienced discrimination because of prejudice and aversion--because they make non-handicapped people uncomfortable. H.R. 1158 clearly prohibits the use of stereotypes and prejudice to deny critically needed housing to handicapped persons. The right to be free from housing discrimination is essential to the goal of independent living.

House Report at 18 (footnote omitted).[25]

On September 17, 1988, the Office of Legal Counsel of the Department of Justice issued an opinion concluding that section 504 of the Rehabilitation Act of 1973 protects asymptomatic as well as symptomatic people with HIV infection against discrimination in any covered program or activity on the basis of actual, past or perceived effects of HIV infection that substantially limit any major life activity, so long as the infected person is "otherwise qualified" to participate in the program or activity. The phrase "otherwise qualified" is the standard articulated by the Supreme Court in *School Bd. of Nassau County, Florida v. Arline*, 480 U.S. 273 (1987). Memorandum by U.S. Department of Justice, Office of Legal Counsel, for Arthur B. Culvahouse, Jr., Counsel to the President (Sept. 27, 1988). This Justice Department opinion is important because of the expressed desire of Congress that the definition of handicap under the Fair Housing Act be consistent with section 504.[26]

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[25] The daily edition of the Congressional Record for June 29, 1988, contains many statements in support of the concept that HIV infection is a handicap within the meaning of the Act. Of particular noteworthiness are the statements made by Representatives Owens (at H4922), Waxman (at H4221), Schroeder (at H4612), Coehlo (at H4613), and Pelosi (at H4689). Furthermore, an amendment was offered during the debates on the Act which would have excluded from the definition of "handicap" any current impairment that consists of an infectious, contagious, or "communicable disease whether or not such disease causes a physical or mental impairment during the period of contagion." The debate on this amendment primarily centered around people with HIV infection, and it was defeated. House Report at 28.

[26] It was noted in the House Report that the definition of handicap in the regulations implementing section 504 does not include a list of specific diseases or conditions that constitute physical or mental impairments because of the difficulty of enforcing the comprehensiveness of any such list and because some conditions covered by the definition may not have been

Because the legislative history of the Act explicitly indicates that HIV-infected people are protected, and in view of the Justice Department opinion described above, HUD added "Human Immunodeficiency Virus" to the illustrative list of "physical or mental impairments" that is included in the definition of "handicap" in the implementing regulations. *See* 24 CFR Ch I, Subch. A, App. I at 578 (1990). Thus, the regulations codified at 24 CFR 100.201 provide, in pertinent part, that, as used in the definition of "handicap":

> (a) "Physical or mental impairment" includes: (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) Any mental or psychological disorder ... [and] such diseases and conditions as orthopedic, visual, ... epilepsy, muscular dystrophy, ... cancer, ... Human Immunodeficiency Virus infection ... and alcoholism.
>
> (b) "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

This inclusion of HIV infection in the definition of handicap bears the force of law because courts have for a long time held that substantive agency regulations have the "force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979); *Doe v. Syracuse School Dist.*, 508 F. Supp. 333, 337-38 (N.D. N.Y. 1981); *see also* 3 Mezines, Stein, Gruff, *Administrative Law* Sec. 14.01 (1979). Indeed, the regulations codified to implement the Fair Housing Act specifically have been declared to have the force of law. *See Carson v. Rochester Hous. Auth.*, Fair Housing-Fair Lending (P-H) para. 15,643 (W.D. N.Y. Aug. 6, 1990) (housing authority's inquiries into nature and scope of housing applicant's medical condition and requirement that applicant release confidential medical information are in violation of Act and 24 CFR 100.202(c)).

There has not yet been a determination by the Supreme Court as to whether HIV-infected people are handicapped within the definitions of that term as set forth in section 504 of the Rehabilitation Act and the Fair Housing Act. However, the Court's discussion and decision in the *Arline* case, from which many of the concepts in the Fair Housing Act were formulated, indicate that it is likely that the Court would reach the same conclusion with regard to HIV infection and AIDS. In finding that a teacher with tuberculosis had a handicap within the meaning of section 504 and was subject to its protection, the Court stated that section

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discovered at the time the legislation was passed. Congress specifically noted that "AIDS and infection with the Human Immunodeficiency Virus (HIV) are covered under [the Fair Housing] Act, although such conditions were not even discovered when section 504 was passed in 1973." House Report at 22, n.55, *citing, e.g., Local 1812, Am. Fed'n of Gov't Employees v. U.S. Dep't of State*, 622 F. Supp. 50, 54 (D.D.C. 1987); *Ray v. School Dist. of DeSoto County*, 660 F. Supp. 1524 (M.D. Fla. 1987).

504 is structured to replace reflexive reactions based upon irrational fear of actual or perceived handicaps with actions based upon reasoned and medically sound judgments. *Arline,* 480 U.S. at 285. The Court found the teacher to have a physical impairment since she had a physiological disorder or condition affecting her respiratory system. *Id*. at 281. The Court reasoned that the definition of "handicapped individual" is broad, but only those people who are both handicapped and "otherwise qualified" to do the job are eligible for relief. The case was remanded to the District Court with instructions to make an individualized inquiry to determine whether the teacher was otherwise qualified to perform the functions of her job. *Id*. at 289. However, the Court's thinking on the handicap itself and the teacher's protection under section 504 is clear.

Since *Arline*, other courts have held, in a series of school-related cases, that section 504 applies to persons with HIV infection. In *Chalk v. U.S. Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701 (9th Cir. 1988), the court held that a teacher with AIDS had demonstrated a probability of success on the merits of his claim for reinstatement brought under section 504. In ruling that discrimination on the basis of an unfounded fear of a contagion violates section 504, the court stated that a person with AIDS is not required to disprove every theoretical possibility of harm since medical evidence showed that there was no significant risk that the teacher would transmit the disease to others. *Id*. at 709. *See also Martinez v. School Bd. of Hillsborough County, Fla.*, 861 F.2d 1502 (4th Cir. 1988) (student with AIDS has handicap under section 504); *Robertson v. Granite City Community Unit School Dist. 9*, 684 F. Supp. 1002 (S.D. Ill. 1988) (student with AIDS Related Complex was found to be handicapped under section 504); *Doe v. Dolton Elementary School Dist. No. 148*, 694 F. Supp. 440 (N.D. Ill. 1988) (student with AIDS is handicapped under section 504). As stated by the court in *Dolton*, "[s]urely no physical problem has created greater public fear and misapprehension than AIDS. That fear includes a perception that a person with AIDS is substantially impaired in his ability to interact with others ...." *Id*. at 444. *See also Arline*, 480 U.S. at 284.

Not long after the school cases, and in one case within the same year that the Fair Housing Amendments Act became effective, two courts held that the Act, as amended, protects people with AIDS or HIV infection from housing discrimination. In *Baxter v. City of Belleville, Ill.*, 720 F. Supp. 720 (S.D. Ill. 1989), the court granted an injunction to a developer seeking to compel issuance of use permits to allow a building to be remodeled for occupancy by persons with AIDS. The court stated that Congress clearly intended to include persons with HIV infection within the definition of "handicap" under the Fair Housing Act. The court also held that "the inability to reside in a group residence due to the public misapprehension that HIV-positive persons cannot interact with non-HIV-infected persons adversely affects a major life activity." *Baxter,* 720 F. Supp. at 730. *See also Association of Relatives and Friends of AIDS Patients v. Regulations and Permits Admin.*, 740 F. Supp. 95 (D.C. P.R. 1990) (court stated that there is "little question" that persons with AIDS are "handicapped" within the meaning of the Act, and granted an injunction to allow plaintiffs to open a hospice for AIDS patients).

Federal courts have also found people with AIDS to be protected under state anti-discrimination laws where those laws contain definitions of "handicap" that are identical or nearly so to the definitions found in section 504 and the Fair Housing Act. In *Cain v. Hyatt*, 734 F. Supp. 671, 678 (E.D. Pa. 1990), the court noted the growing "consensus" that AIDS qualifies as a handicap or disability under various federal and state anti-discrimination laws. In interpreting the definition of "handicap" under the Pennsylvania Human Relations Act, the court found that AIDS constitutes a handicap for two reasons. First, both the

underlying viral condition and the symptoms of AIDS give rise to physical impairments that substantially limit one's abilities to engage in major life activities; and, second, society's prejudices deem persons with AIDS as having such impairments. *Cain*, 734 F. Supp. at 679.

I agree with the analysis of the court in *Cain* and, for purposes of the case at hand, I find that HIV infection or AIDS constitutes a handicap. Further, based on all of the foregoing analysis of what constitutes a handicap for purposes of protection under the Fair Housing Act, I find that Complainant, as a person with HIV infection and AIDS, is a person with a handicap who is therefore protected under the provisions of the Act.

B. **Legal Framework for the Analysis of a Fair Housing Case**

HUD's Chief Administrative Law Judge, Alan W. Heifetz, articulated the burden of proof test to be applied in housing discrimination cases brought under the Fair Housing Act where there is no direct evidence of discrimination in *HUD v. Blackwell*, Fair Housing-Fair Lending (P-H) para. 25,001 at 25,005 (HUDALJ No. 04-89-0520-1, Dec. 21, 1989) ("*Blackwell*"). This statement of law was upheld by the United States Court of Appeals for the Eleventh Circuit in *Secretary, HUD On Behalf Of Heron v. Blackwell*, 908 F.2d 864 (11th Cir. Aug. 9, 1990). As held in *Blackwell*, the well-established three-part test applied by the federal courts in employment discrimination cases brought under Title VII of the Civil Rights Act, as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), should also be applied to housing discrimination cases that are brought before this forum. *See Blackwell* at 25,005. *See also Politt v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio 1989); R. Schwemm, *Housing Discrimination Law* 323, 405-10 & n.137 (1983). That burden of proof test is as follows:

> First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence ... Second, if the plaintiff sufficiently establishes a prima facie case, the burden shifts to the defendant to "articulate some legitimate, undiscriminatory [sic] reason" for its action .... Third, if the defendant satisfies this burden, the plaintiff has the opportunity to prove by a preponderance that the legitimate reasons asserted by the defendant are in fact pretext ....

Politt, 669 F.Supp. at 175, *citing McDonnell Douglas*, 411 U.S. at 802, 804. This shifting burden of proof format is designed to assure that the "plaintiff [has] his day in court despite the unavailability of direct evidence." *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1984), *citing Loeb v. Truxton, Inc.*, 600 F.2d 1003, 1014 (1st Cir. 1979) (disapproved on other grounds in *Trans World Airlines*).

It was further established in this forum that where a complainant and the Government can produce direct evidence of discrimination, the shifting burden of proof analysis set forth in *McDonnell Douglas* need not be applied. *HUD v. Murphy*, Fair Housing-Fair Lending (P-H) para. 25,002 at 25,052 (HUDALJ No. 02-89-0202-1, July 13, 1990), *citing Trans World Airlines*, 469 U.S. at 121; *see also Teamsters v. U.S.*, 431 U.S. 324, 358, n.44 (1977).

C. **The Complainant's and Government's Two Claims of Directly-Evidenced**

Discrimination

1. Williams's March 1989 Phone Call to Kelly During Which Williams Inquired if Kelly Has AIDS

The Government contends that Williams's phone call in late March 1989, in which he inquired whether Kelly has AIDS, violated section 804(f) of the Act and 24 CFR 100.202 by invading Kelly's right to maintain the confidentiality of his medical condition, which has already been found to constitute a handicap under the Act. It further argues that in making the call, Williams violated section 804(c) of the Act and 24 CFR 100.75 by expressing a preference for people who do not have AIDS. Finally, the Government claims that Respondent's phone call also violated section 818 of the Act and 24 CFR 100.400(c)(2) by intimidating and harassing Kelly, and interfering with his quiet enjoyment of his home. As discussed below, certain aspects of the phone call violated sections 804(f) and 818 of the Act, as well as 24 CFR 100.202 and 100.400(c)(2), but no aspect of the phone call violated section 804(c) of the Act and 24 CFR 100.75.

a. Section 804(f) of the Act and 24 CFR 100.202

The Government argues that Respondent's phone call subjected Complainant to discrimination in the terms, conditions or privileges of a rental or dwelling in violation of section 804(f)(2) of the Act and 24 CFR 100.202(b).[27] Section 804(f)(2)(A) of the Act (42 U.S.C. Sec. 3604(f)(2)(A)) and 24 CFR 100.202(b)(1) make it unlawful to discriminate against any person in the terms, conditions, or privileges of the rental of a dwelling because of that person's handicap.

In the context of section 804(f) and 24 CFR 100.202, the facts surrounding Respondent's phone call raise the issue of whether the prohibitions set forth in those sections protect sitting as well as prospective tenants from certain inquiries concerning that person's handicap. In resolving this issue in light of the specific allegation made by the Government, section 804(f)(2) of the Act and the corresponding regulation, 24 CFR 100.202(b), must be interpreted and applied in conjunction with Section 804(f)(9) of the Act (42 U.S.C. Sec. 3604(f)(9)) which provides, *inter alia,* that nothing in subsection (f) requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals. *See also* 24 CFR 100.202(d), which contains identical language to that of Section 804(f)(9).

As an initial matter, the Government erroneously claims that 24 CFR 100.202(b) "specifically makes it unlawful to make an inquiry to determine whether a person who intends to occupy a dwelling has a handicap or to ask about the nature or severity of a disability." The quoted prohibition is actually contained in 24 CFR 100.202(c). That subsection is explicitly limited by its language to "an applicant for a dwelling" or "a person intending to reside in that dwelling", and contains no language that would extend its coverage to sitting tenants. In comparison, by extending their coverage to a "buyer or renter" and "a person residing in ... [a] dwelling", subsections (a) and (b) of section 100.202, as well as section 804(f)(1)

[27] The Government makes reference to section 804(f)(1) in its discussion of the phone call, but does not assert that it is applicable to the facts of this case in this particular context. Section 804(f)(1)(A) of the Act (42 U.S.C. Sec. 3604(f)(1)(A)) and 24 CFR 100.202(a)(1) make it unlawful to discriminate in the rental, or to otherwise make unavailable or deny, a dwelling to any renter because, *inter alia,* of a handicap of that renter.

and (2) of the Act, apply to sitting tenants. *See* 42 U.S.C. Sec. 3604(f)(1)(A), (B) and (f)(2)(A), (B); 24 CFR 100.202(a)(1), (2) and 202(b)(1), (2).

Although it cannot be found that 24 CFR 100.202(a) and (b), as well as sections 804(f)(1) and (2) of the Act, explicitly prohibit certain inquiries of sitting tenants as is done for applicants by the inclusion of section 100.202(c), I do find that their prohibitions against discrimination implicitly include the making of certain inquiries of sitting tenants. The House Report at page 30 states that under section 804(f)(9) of the Act,[28] "...[a] landlord or owner [may not] ask the applicant or tenant questions which would require the applicant or tenant to waive his right to confidentiality concerning his medical condition or history."[29] Moreover, the preamble to HUD's regulations which implement the Act provides that a "housing provider may judge handicapped persons on the same basis it judges all other applicants and residents", and that the housing provider "may not treat handicapped applicants or tenants less favorably than other applicants or tenants." 24 CFR Ch. I, Subch. A, App. I at 577 (1990). Thus, while the text of the statute and corresponding regulation leave some fog over the question of whether Congress meant to protect sitting tenants as well as applicants from certain inquiries, the House Report and preamble take a major step in that direction.

Under section 804(f)(9), owners of housing do not have the right to ask prospective tenants or buyers blanket questions about their disabilities. House Report at 30. Moreover, in addition to the provisions of the preamble quoted in the preceding paragraph, the preamble provides that a "housing provider may consider for *all* applicants, including handicapped applicants, such concerns as past rental history, violations of rules and laws, a history of disruptive, abusive, or dangerous behavior." 24 CFR Ch. I, Subch. A, App. I at 577 (emphasis in original). Thus, since the House Report and preamble appear to support the interpretation that sitting tenants are included, and since there is no reason readily imaginable or argued to support the concept that Congress would intend protection from intrusive questioning for prospective tenants, but not sitting tenants, I find that section 804(f) of the Act and 24 CFR 100.202 provide that owners of housing do not have the right to ask sitting tenants, as well as prospective tenants, blanket questions about their disabilities. As argued by the Government, permitting landlords to ask their sitting tenants blanket questions about their disabilities that bear no relationship to the health of others would create an "open season" on the privacy rights, sensibilities and civil rights of persons with disabilities, and

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[28] In the House Report, the provision which ultimately became enacted as section 804(f)(9) was designated as section 804(f)(7). *See* House Report at 3.

[29] In *Cason v. Rochester Hous. Auth.*, Fair Housing-Fair Lending (P-H) para. 15,643 (W.D. N.Y. Aug. 6, 1990), the court found that the Housing Authority's detailed inquiries into the nature and scope of a housing applicant's disabilities and its requirement that applicants release confidential medical information violated the Fair Housing Act and the implementing regulations. In finding that the Authority considered handicapped applicants by a different standard than non-handicapped applicants, the court in *Cason* recognized that handicapped applicants have a privacy right to be free from specific inquiries concerning their disabilities and intrusive requirements that they consent to release of otherwise confidential medical information. *Id.* at 16,301-303. I agree with the court's finding that the Housing Authority clearly violated the Act by conditioning eligibility on such inquiries. The court said that the Authority's difference in treatment of handicapped applicants from non-handicapped applicants "stem[med] from unsubstantiated prejudices and fears regarding those with mental and physical disabilities." *Id.* at 16,302. This is precisely the sort of disparate treatment of handicapped people that the Fair Housing Act was designed to prohibit.

would thereby violate the Act and regulations.

However, although blanket questioning of sitting and prospective tenants as to their disabilities is not permissible, certain inquiries of individual tenants may be permissible. A landlord must base such a difference in treatment of a tenant, because of a handicap, on a "nexus between the fact of the individual's tenancy and [an] asserted direct threat" to the health or safety of other individuals. House Report at 29.[30] In the absence of such a nexus, such an inquiry is impermissible under the Act.

As noted in the House Report at 28, section 804(f)(9) was adopted based on case law developed under section 504 of the Rehabilitation Act. In this light, it was further stated in the House Report at 28:

> Section 504, which governs programs and activities receiving federal financial assistance, provides that no "otherwise qualified handicapped individual" may be subjected to discrimination solely on the basis of his or her handicap. Handicapped individuals are "otherwise qualified" if, with reasonable accommodation, they can satisfy all the requirements for a position or services. An individual is not otherwise qualified if, for example, he or she would pose a threat to the safety of others, unless such threat can be eliminated by reasonable accommodation.

(Footnotes omitted).

In the House Report's discussion of section 804(f)(9), particular reliance was placed on the Court's decision in *Arline*, in which, as discussed above, the Court found that a teacher with tuberculosis, a contagious disease, had a handicap as defined in and covered by the protections of section 504. 480 U.S. at 288. Thus, as stated in the House Report at 29, "[i]n *Arline*, the Court held that [a] person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk."[31]

Indeed, in the House Report at 29, Congress stated its intention that "the direct threat requirement [set forth in Section 804(f)(9)] incorporates the *Arline* standard, and a dwelling need not be made available

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[30]The opposite interpretation of the Act and its implementing regulations, permitting landlords to ask tenants whether they have diseases that pose no threat to others, would make a mockery of the Act's premise that handicapped people are to be treated with the same dignity as non-handicapped people in the United States housing market. The court in *Syracuse School Dist.*, 508 F. Supp. 33, found that the defendant school district's asking a teacher applicant whether he ever had been treated for any "migraine, neuralgia, nervous breakdown, or psychiatric treatment" was an impermissible inquiry into the plaintiff's medical condition in violation of section 504 of the Rehabilitation Act and its implementing regulations. Because it was found that a history of treatment for mental or emotional problems is no indication of a teacher's present fitness for a teaching position, the court held that the defendant's questions violated both the letter and the spirit of the regulations codified at 45 CFR 84.14.

[31]As stated above, in *Arline*, the Court remanded the case to determine whether the teacher was "otherwise qualified to do the job". An "otherwise qualified person is one who is able to meet all of the program requirements in spite of his handicap." *Arline*, 480 U.S. at 287, n.17, *citing Southeast Community College v. Davis*, 442 U.S. 397, 406 (1979).

to an individual whose tenancy can be shown to constitute a direct threat and or significant risk of harm to the health or safety of others."[32] Moreover, with reference to the direct threat requirement, the landlord is required to establish that there is a nexus between the fact of the individual's tenancy and the asserted direct threat. House Report at 29. Thus, Congress directed courts "to evaluate whether a direct threat and a significant risk of harm existed in the context of the individual's tenancy." *Id.* Congress further directed that an assertion of a direct threat and substantial risk of harm "must be established on the basis of a history or overt acts or current conduct." *Id.* Thus, "[g]eneralized assumption, subjective fears, and speculation are insufficient to prove the requisite direct threat to others." *Id. See also Chalk*, 840 F.2d at 701; *New York State Ass'n for Retarded Children v. Carey*, 612 F.2d 644, 649-50 (2d Cir. 1979).

In this case, the handicap involved in the alleged disparate treatment is AIDS, which, because of its association with drug use, sexual "fault", racial minorities, the poor, and "other historically disenfranchised groups," tends to "visit condemnation upon its victims." *Cain*, 734 F. Supp. at 680, *citing* S. Sontag, *AIDS and Its Metaphors* 44-46, 54-59 (1989). The court in *Dolton*, 694 F. Supp. at 444, stated that "surely no physical problem has created greater public fear and misapprehension than AIDS. Thus, AIDS is a particularly sensitive medical condition to which a broad right of confidentiality attaches. *See* Dunlap, *AIDS and Discrimination in the United States: Reflections on the Nature of Prejudice in a Virus*, 24 Vill.L.Rev. 909, 917-20 (1989). However, despite the confidentiality to which Complainant was entitled, under the particular facts of this case, a nexus has been established between the facts of Complainant's tenancy and a direct threat to the health and safety of others, namely, Respondent's minor children. Thus, under the particular fact of this case, it was permissible for Respondent to have asked Complainant if he has AIDS.[33]

As discussed above, Respondent's minor children were responsible for cleaning the bathroom Complainant shared with the other tenants who resided on the third floor of Respondent's rooming house. According to Respondent, his inquiry as to whether Complainant has AIDS was prompted by his wife, who, the record shows, was primarily concerned that the children could contract the disease in connection with their cleaning duties. Thus, pursuant to the analytic framework set forth by the Court in *Arline*, the relevant inquiry is whether there was a "significant risk" of transmission of the HIV virus to Respondent's minor children by virtue of Complainant's tenancy.

With respect to a determination of whether there was a significant risk of transmission, the Court in *Arline*, agreeing with the American Medical Association, stated that the inquiry into whether the teacher

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[32] If a reasonable accommodation could eliminate the risk, entities covered under the Act are required to engage in such accommodation. House Report at 29. *See also* 42 U.S.C. Sec. 3604(f)(3)(B).

[33] In assessing the permissibility of Respondent's phone inquiry, I need not reach the issue of whether Complainant was "otherwise qualified" for the tenancy, *i.e.*, whether he met all the prerequisites of the tenancy and whether reasonable precautions would have eliminated the risk of transmission. Whether Complainant was "otherwise qualified" goes to whether Complainant's tenancy should have continued despite his having a contagious disease. As discussed above, after the inquiry was made, his tenancy continued. Moreover, as discussed below, there is no evidence that the inquiry affected either Respondent's subsequent treatment of Complainant or Complainant's subsequent decision to vacate the premises. Indeed, the making of such an inquiry, under the particular facts of this case, which involves a sitting tenant, was the only way Respondent could have determined whether a substantial risk of infection did in fact exist, and if so, whether reasonable precautions needed to be taken to eliminate that risk.

posed a significant health and safety risk should include:

> [findings of] facts, based on reasonable medical judgments given the state of medical knowledge about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious, (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm.

480 U.S. at 288.

Dr. Jeffrey Jacobson, Director of the Infectious Diseases Section of the Bronx V.A. Medical Center, was accepted as an expert on HIV infection and AIDS at the hearing in this case. *See supra* n.3. He testified that people with HIV infection pose no risk of transmission through ordinary household or casual contact. (T 272, 295).[34] He further testified that studies done regarding household contact with persons with HIV infection have yielded no known cases of the infection's being transmitted through such contact. (T 295).

In addition to Dr. Jacobson's testimony at the hearing, the Surgeon General of the United States has stated that there is no risk of getting AIDS from casual contact and that family members living with individuals who have AIDS do not become infected, except through sexual contact, even if those family members share food, towels, and cups, and kiss each other. Surgeon General of the United States, *Report on Acquired Immune Deficiency Syndrome*, U.S. Dept. of Health and Human Services (1987) at 13 ("*Surgeon General's Report*"). As stated by the Surgeon General:

> Casual social contact such as shaking hands, hugging, social kissing, crying, coughing, sneezing, will not transmit the AIDS virus. Nor has AIDS been contracted from swimming in pools or bathing in hot tubs or from eating in restaurants .... AIDS is not contracted from sharing bed linens, towels, cups, straws, dishes, or any other eating utensils. You cannot get AIDS from toilets, doorknobs, telephones, office machinery, or household furniture.

Id. at 21.

However, as Dr. Jacobson testified, the methods by which the HIV virus is transmitted include the inoculation or transfusion of contaminated blood products. (T 270). Thus, although there have been no known incidents of transmission of the virus through the sharing of razors, Dr. Jacobson testified that it is

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[34] *See also* Fischl, *et al.*, *Evaluation of Heterosexual Partners, Children and Household Contacts of Adults with AIDS* , 257 J. A.M.A. 640 (1987). The reasoned medical opinions of doctors and public health officials have been accepted by courts making inquiries with regard to various claims under the Act and section 504. Those courts have found that persons with HIV infection pose no risk of transmission to the community at large (*Baxter*, 720 F. Supp. 720); in the classroom (*Dolton*, 694 F. Supp. 440); or in the workplace (*Cain*, 734 F. Supp. 671).

possible for a person to become infected with the virus if the blade of a razor used by another person already infected with the virus was contaminated with the blood of that person and nicked the skin of the uninfected person. (T 294-95). Moreover, although the virus is not transmitted through the handling of ordinary garbage, Dr. Jacobson testified that it could be transmitted if a needle which has been used by a person infected with the virus is hidden in the garbage and sticks an uninfected person. (T 272). Finally, Dr. Jacobson testified that although HIV patients at his as well as other hospitals share bathrooms, insofar as those hospitals handle blood products and other bodily secretions, they practice the universal precautions established by the CDC. Although the precautions serve to prevent the spread of various viruses, CDC only began "pushing" their use in 1987. (T 272-73).

The method of transmission at issue insofar as Respondent's children cleaning the bathroom shared by Complainant is concerned is the inoculation of contaminated blood products. Based on Dr. Jacobson's testimony that the virus is very fragile outside the human system and cannot live long outside of a human's body (T 295), the duration of the risk to others of contracting AIDS through either the scenario of being nicked with a contaminated razor or being stuck with a contaminated needle, each either left on a bathroom counter or in bathroom garbage, is relatively short. However, because, as testified by Dr. Jacobson, nearly all, if not all, patients infected with the virus ultimately will develop some manifestations of the disease (T 263, 294), and since AIDS is a fatal disease for which there is no known cure (T 266), the severity of the risk, *i.e.*, the potential harm to the third parties is extremely high. Although the probability, in a general sense, of being nicked with a contaminated razor or being stuck with a contaminated needle is relatively low, that probability increases dramatically where an uninfected person is responsible for cleaning a bathroom used by an infected person who is a drug addict and in which universal precautions or the like are not known or practiced. [35] Finally, as stated above, if the virus is transmitted, because AIDS is a fatal disease for which there is no known cure, the degree of harm is extremely high.

Under the particular facts and circumstances of this case, a significant risk of harm existed in the context of Complainant's tenancy insofar as Respondent's minor children were responsible for cleaning the rooming house bathroom shared by Complainant. At the time Respondent made the inquiry, he had reason to suspect that Complainant has AIDS and knew, as a fact, that Complainant is a drug addict. [36] Respondent was also aware that the virus could be transmitted by a contaminated razor or needle, and that AIDS is a deadly disease. Thus, Respondent's minor children were responsible for cleaning a bathroom in which the special precautions taken by hospitals were not being utilized but in which there was a possibility that needles or razor blades contaminated with the HIV virus could be left on a counter or in the trash. Therefore, there was a possibility that the minor children, in cleaning the bathroom, which could entail clearing items from the counters, placing items in the trash, and removing trash, could be nicked by a razor or stuck with a needle left in the bathroom by Complainant, and thereby contract the virus.

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[35] From the start of Complainant's tenancy, Respondent was aware that Complainant is a drug addict who had recently undergone rehabilitation. (D 190, 196-97, 209, 211-12).

[36] Although Complainant volunteered at the start of his tenancy that he had an illness, he represented to Respondent that it was rheumatic fever. (D 208, 218). Thus, it was not until Respondent was advised by an anonymous phone caller that Complainant has AIDS that Respondent, due to his wife's concern for the children's safety, inquired from Complainant whether he has AIDS.

Although, admittedly, the events needed to create such a scenario would have to be extremely contemporaneous since the virus is fragile and does not live long outside the human body, the probability is not so low as to be negligible. This is so especially since minor children were the persons at risk, and the care with which they cleaned the bathroom might have been less than that which would have been exercised by an adult. Moreover, if such a scenario were to occur, the ramifications would be of the utmost seriousness since nearly all, if not all, persons infected with the virus will develop some manifestation of the disease, and since the disease is, at present, incurable and fatal. Under these facts and circumstances, a nexus between the facts of Complainant's tenancy and the asserted direct threat to Respondent's minor children has been established. Accordingly, the making of the phone call by Respondent to inquire if Complainant has AIDS did not violate section 804(f)(2) of the Act and 24 CFR 100.202.

However, the timing, circumstances and content of Respondent's inquiry violated those statutory and regulatory provisions. Respondent's call in the early morning intimidated Kelly and made him feel vulnerable to unknown inferior treatment. Awakening a tenant at 6:00 a.m. to confront him with an inquiry about his handicap, a medical condition which is fatal and is wrought with prejudices and fear, and not prefacing the inquiry with an adequate explanation of its intent and purpose, is an act which by its nature, constitutes the type of discriminatory conduct prohibited by section 804(f)(2) and 24 CFR 100.202(b)(1). Indeed, Dr. Buckiewicz, the psychologist who treated Kelly at the Montrose halfway house, testified at the hearing that people with AIDS feel "toxic" because other people fear them and therefore want to avoid and exclude them. Thus, without being provided with a full explanation of the purpose of the inquiry, a tenant would understandably conclude that the information sought was of urgent interest to the landlord and would surely fear for how the landlord would use the information to take an adverse action against him. Finally, by his own testimony, it took Respondent a week "to get up the nerve" to make the call and that he was "embarrassed" to do so. Thus, Respondent had some idea of what the effect of such a call would be on Complainant.

b. Section 818 of the Act and 24 CFR 100.400(c)(2)

The Government also asserts that Respondent's phone inquiry violated section 818 of the Act (42 U.S.C. Sec. 3617) and 24 CFR 100.400(c)(2) by intimidating and harassing Kelly, and by interfering with his quiet enjoyment of his home. Section 818 makes it unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, any right granted or protected by the Act. Section 100.400(c)(2) of Title 24 of the Code of Federal Regulations provides that conduct unlawful under section 818 includes, but is not limited to: threatening, intimidating, or interfering with a person in his enjoyment of a dwelling because of such person's handicap.[37] For the same reasons discussed above with regard to Section 804(f)(2) of the Act and 24 CFR 100.202(b)(1), Respondent's making of an inquiry as to whether Complainant has AIDS did not violate Section 818 of the Act or 24 CFR 100.400(c)(2). However, for the same reasons discussed above with regard to Section 804(f)(2) and 24 CFR 100.202(b)(1), the timing, circumstances and content of Respondent's phone call, by

[37]The Government relies primarily on 24 CFR 100.400(c)(2), but also makes mention of 24 CFR 100.400(c)(1). Section 100.400(c)(1) provides that conduct unlawful under section 818 includes, but is not limited to: coercing a person to deny or limit the benefits provided that person in connection with the rental of a dwelling because of handicap. The Government does not, however, proffer any explanation as to how the phone call coerced Complainant in that manner.

having the effect of threatening and intimidating Complainant and interfering with the quiet enjoyment of his home, violated Section 818 of the Act and 24 CFR 100.400(c)(2).

c. Section 804(c) of the Act and 24 CFR 100.75

The Government also claims that Respondent's telephone inquiry violated section 804(c) of the Act and 24 CFR 100.75. Section 804(c) (42 U.S.C. Sec. 3604(c)) and 24 CFR 100.75(a) make it unlawful to make any statement with respect to the rental of a dwelling that indicates any preference, limitation, or discrimination based on handicap or an intention to make any such preference, limitation or discrimination. Section 100.75(b) of Title 24 of the Code of Federal Regulations further provides, *inter alia*, that the prohibition of that section applies to all written or oral statements by a person engaged in the rental of a dwelling.

According to the Government, the telephone call violated section 804(c) and 24 CFR 100.75 because it expressed discrimination, limitation, or preference for not having Kelly live in the house because of his handicap. The Government supports this theory by pointing to the remarks made by Respondent's wife and the fact that she urged Respondent to make the call. However, as stated earlier, Respondent's wife is not a party to this case, and there are no instances in evidence to show that Williams did or said anything to express or effect such a preference. As discussed above, Williams's inquiry was motivated by his wife's concern for their children's safety, not by a desire on the part of Williams to evict Kelly. Thus, I do not find Respondent in violation of section 804(c) of the Act or of 24 CFR 100.75.

2. Williams's Conduct Towards Kelly After the Phone Call

The Government's second claim of directly-evidenced discrimination is that a combination of discriminatory actions taken toward Respondent after "learning" of Complainant's handicap subjected Complainant to a hostile environment which violated sections 804(f)(1) and (2) and 818 of the Act. Specifically, the Government argues this hostile environment had the effect of "constructively evicting" Complainant due to his handicap and, in that regard, was in violation of section 804(f)(1) of the Act, as well as 24 CFR 100.202 and 100.60(b)(5).[38] Similarly, the Government argues that Respondent's actions violated section 818 of the Act and 24 CFR 100.400(c) because they intimidated, threatened, or interfered with Complainant's exercise of his right to live in his room free from discrimination and interfered with his enjoyment of the dwelling because of his handicap. Further, the Government argues that the actions taken by Respondent after "learning" of Complainant's handicap constituted different terms and conditions of tenancy in violation of section 804(f)(2) of the Act. Finally, the Government argues that some of the statements in the notes sent by Respondent concerning Complainant's tenancy constituted "independent violations" of section 804(c) of the Act because they expressed a preference for not having Complainant live in the house because of his handicap.

With regard to these alleged violations, the Government argues that the conduct at issue includes the telephone call discussed above. According to the Government, Respondent "learned" of Complainant's

[38] Section 100.60(b)(5) of Title 24 of the Code of Federal Regulations makes it unlawful to evict a tenant because of, *inter alia*, his handicap.

handicap when he was advised by an anonymous caller that Complainant has AIDS. Therefore, according to the Government, the phone call to Kelly constitutes an independent violation of the Act and regulations as discussed above, as well as an aspect of Respondent's conduct taken after "learning" of Complainant's handicap which further violates the Act and regulations as alleged in the preceding paragraph.

Contrary to the terminology applied by the Government, Respondent's inquiry regarding Complainant's health was by definition not after "learning" that Complainant has AIDS. It was how and when he inquired whether Complainant has AIDS. As stated above, Respondent made the inquiry because he suspected Kelly has AIDS. That suspicion, which he sought to confirm through his inquiry, was based on a telephone call he had received from a person who did not identify himself but who advised him that Kelly has AIDS. In response to the inquiry, Kelly denied that he has AIDS, and Williams accepted that denial. Therefore, in assessing the Government's claims with regard to Respondent's conduct after "learning" Complainant has AIDS, I have considered those aspects of Respondent's conduct which occurred after the phone call, and have addressed the Government's arguments accordingly.

a. Sections 804(f)(1) and 818 of the Act and 24 CFR 100.202, 100.60(b)(5), 100.400

As stated above, the Government argues that Respondent's conduct after "learning" Complainant has AIDS created a hostile environment which constituted constructive eviction, harassment and interference with Complainant's quiet enjoyment of the property. More specifically, the Government claims that in addition to the phone call, the notes left for Complainant, the visits to Complainant's room, and the legal action taken to evict Complainant formed a pattern of abuse that was directed at Kelly because of his handicap. It further argues that "the pervasiveness, frequency and offensiveness" of Respondent's actions could not help but create a hostile environment that eventually forced Complainant to move out. The Government also argues that because Complainant is living with two diseases, AIDS and drug addiction, for which society attaches blame to its victims, he deeply felt what he perceived to be Williams's discriminatory and harassing conduct towards him.[39] Thus, the Government argues that Kelly felt threatened, scared, and rejected, and that the atmosphere created by Respondent's "persistent efforts at harassment" had a serious effect on Complainant's psychological and physical well being.[40]

With regard to the allegation of constructive eviction, it is well established that an eviction may be actual or constructive. A disturbance of a tenant's possession by a landlord, or by someone acting under

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[39] *See* Sontag, *AIDS and its Metaphors* at 104.

[40] The court in *Shellhammer v. Lewallen*, 1 Fair Housing-Fair Lending (P-H) para. 15,472 at 136-37 (No. C 82-689 (W.D. Ohio 1983)), *aff'd*, 770 F.2d 167 (6th Cir. 1985), stated that in determining whether a landlord has created a hostile environment, due to the personal and subjective nature of a tenant's response, liability should not be defeated on the basis of what someone else felt or by the fact that a reasonable person might have felt a different reaction to the landlord's conduct. In that regard, Evelyn Beloff, the therapist who led Kelly's HIV-positive support group, testified that Kelly lost weight and was not eating and sleeping well during the period of alleged harassment. (T 423). Both she and Dr. Buckiewicz testified that they noted that Kelly suffered weight loss, and was showing obvious signs of fatigue and nervousness. Moreover, both Buckiewicz and Beloff urged Kelly to leave the house. (T 207, 424). Beloff attributed Kelly's symptoms to what Kelly was telling her about his situation with Williams. However, both weight loss and fatigue are symptoms of AIDS. (T 265).

the landlord's authority, which deprives a tenant of the beneficial enjoyment of the premises, causing him to abandon it, amounts to constructive eviction, provided the tenant abandons the premises within a reasonable time.[41] The general rule under Title VII of the Civil Rights Act of 1964, which deals with employment discrimination, is that if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, the employer has constructively discharged the employee and is liable for any illegal conduct involved, as if he had formally discharged the aggrieved employee. *See Young v. Southwestern Sav. and Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975).[42] The court in *Young* explained that Title VII was designed to restrain discrimination in employment of protected classes of people and that the subtle and unrealistic differences drawn between resignation and discharge do not alter enforcement of the law. Since Title VII and Title VIII have the same basic purpose, to eradicate the effects of bias and prejudice, doctrines from Title VII employment cases are adopted as guidance in deciding cases that arise under the Fair Housing Act.[43] Thus, where a tenant is compelled to vacate the premises due to the discriminatory actions of the landlord, and, thereby, has been constructively evicted, those acts of the landlord are actionable under the Fair Housing Act.

Moreover, with regard to the Government's allegations of harassment and interference with quiet enjoyment, the Supreme Court has held that even absent economic injury, harassment can constitute a cause of action within prohibitions of discrimination if it creates a hostile environment. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986). In *Meritor*, a claim of sexual harassment was found to be actionable under Title VII as creating a hostile environment. A state of psychological well being at the workplace was earlier found to be a "protected term, condition, or privilege for employment" under Title VII. *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982), *citing Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). In *Rogers*, the U.S. Court of Appeals for the Fifth Circuit stated that "the phrase 'terms, conditions, or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination." 454 F.2d at 238. As explained earlier, the legal concepts developed under Title VII law are applicable to cases brought under Title VIII. That is to say, a state of psychological well being at home is a protected term, condition or privilege of tenancy, and the creation of a hostile environment of discrimination through harassment in one's housing and interference with one's quiet enjoyment of the property, including one which compels the tenant to vacate the premises, is actionable under Title VIII.

The problem with the Government's case is that it has not shown that the actions complained of that were taken by Respondent after he "learned" about Complainant's medical condition were taken as a

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[41] 49 Am. Jur. 2d *Landlord and Tenant* Sec. 301 at 316 (1970).

[42] In *Young*, an employee was found to have been constructively discharged in circumstances amounting to religious discrimination where she left her job as a teller after being told she could close her ears during religious exercises which began monthly staff meetings.

[43] *See, e.g., Secretary, HUD On Behalf of Heron v. Blackwell*, 908 F.2d 864, which, as discussed above, affirmed Chief Administrative Law Judge Heifetz's adaptation of the Title VII-oriented three-part burden of proof analysis found in *McDonnell Douglas*, 411 U.S. 792, to cases that arise under Title VIII. *See also Shellhammer v. Lewallen*, 1 Fair Housing-Fair Lending (P-H) para. 15,472 (No. C 82-689 (W.D. Ohio 1983)), *aff'd*, 770 F.2d 167 (6th Cir. 1985), in which the sexual harassment doctrine of Title VII was applied to a Title VIII case.

result of that "knowledge"; *i.e.*, that they constituted discriminatory action based on a handicap.[44] Only the note that is claimed to have said "You got AIDS and we are tired of picking up your garbage" (S 9) appears to have any connection to Kelly's illness. However, this note could not be produced by the Government; it could only show a partial quote from the note in Dr. Buckiewicz's medical records. Most importantly, there was nothing to show that the note, if it did exist, was written by Williams. It may have been written by his wife, who is not a party to this case, but who, it has been shown, wrote some of the other notes and showed a concern regarding Kelly's condition. Indeed, it could have been written by Kelly himself. The point is, that the contents of this note cannot be definitely attributed to Williams.

The remainder of the notes that are not mere rent receipts complain to Kelly regarding things that he does not deny having done; things that would be objectionable to any landlord. He spilled garbage down the interior steps and did not clean it up. Without permission of his landlord, he attached an antenna to the side of the house that hung out over the sidewalk, causing danger to pedestrians. He more than once left water running in the bathroom that resulted, at least once, in water damage to the building.[45] He was late with his rent for June. When he did not pay his rent for September, Respondent offered to let him pay late. Complainant would not talk of making late payments; he refused to pay it. He then also failed to pay for October.

None of the notes written about these problems can be construed as harassment or interference with the quiet enjoyment of the property which led to constructive eviction. Indeed, Kelly testified that he did not believe Williams's requests for overdue rent were harassment. (T 167-68). Even Respondent's actions taken to evict Complainant on the basis of nonpayment of rent were reasonable under the circumstances.[46] The Government itself, in its post-hearing brief, stated, "[i]f the tenant is not meeting the obligations of tenancy, then the landlord may take steps to terminate the tenancy." Moreover, as discussed above, the Act, while providing that tenants are generally under no obligation to reveal their personal medical conditions, further provides that a landlord may hold a handicapped tenant to the same standard of performance (*e.g.*, paying rent on time; not making excessive noise) to which he holds other tenants. Indeed, Patrolman DeLuccia advised Williams that the way to deal with the problems he was having with Kelly was to "... take it through legal channels and have him removed ...." (T 308).

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[44] As discussed above, this section of the decision is limited to those actions which occurred after Williams's phone call. In any event, as concluded above in Section C.1., the timing, circumstances and content of the call have already been found to have violated, *inter alia*, section 818 of the Act and 24 CFR 100.400(c)(2). Even though that aspect of the call violated those statutory and regulatory provisions, it did not constitute constructive eviction. As discussed later, Complainant left the premises after his failure to pay rent, an act which is impermissible even where discrimination has occurred.

[45] Respondent's request that Complainant pay $50 towards repair of certain water damage was not unreasonable *per se* and, thereby, did not constitute harassment or interference with quiet enjoyment of the premises which led to constructive eviction. As discussed *supra*, although Respondent simply applied a skim of plaster to the damage, it is unknown whether Respondent intended to undertake more extensive repairs had he been paid the money for the damage.

[46] Under the facts and circumstances of this case, it is noteworthy that Respondent did not directly tell Complainant to leave and did not enforce such a desire by changing the locks or putting Complainant's property on the street. Indeed, since Respondent maintains a very informal system of tenancy with no leases and runs the property on a "mom and pop" as opposed to large, corporate basis, one would almost expect him to have taken direct action against Complainant had he wanted to evict Complainant, rather than to have made a purported series of subtle nasty comments and actions designed to drive Complainant away after a long period.

While entering Kelly's room without specific permission for each instance does not reflect ordinary landlord and tenant practice, the evidence shows that this landlord's practice, which was acceptable to the tenants, was to do so to collect rent, to leave notes for tenants, and, in Kelly's case, also to gain access to the air-bleeding valve for the heating system and to make needed adjustments to a leak in the system. While Kelly worried over interference with his medications, there is no evidence, or even an allegation, that Williams did so. Kelly worried that Williams would interfere with his personal papers, but, again, there is neither evidence nor even an allegation of any such interference. Neither was there any evidence or allegation that Williams harassed Kelly orally. Finally, Kelly thought that Williams was cutting off his electricity to harass him when, in fact, Kelly was overloading the circuit with too many appliances and blowing the fuse. While he stated his belief that Williams was cutting off the electricity, he also said that, "I got to go back to school because I don't understand that." (T 167).

Much of what the Government charges constituted constructive eviction, harassment, and interference with quiet enjoyment of the property appears more likely to have been due to Kelly's way of thinking and of construing events, rather than any intent of Williams's. As Kelly said, he had a hard time coping with his feelings and life's pressures. Notwithstanding what the court said in *Shellhammer* (*see supra* n.40), harassment, interference with quiet enjoyment of the property, and constructive eviction cannot be found here because Williams did not exceed the ordinary reactions that could be reasonably expected of a landlord confronted with blown fuses, water running through a ceiling, garbage on the stairs, an unauthorized antenna, and unpaid rent.[47] That is to say, Respondent's initial action was not harmful by its nature. Therefore, he cannot be held accountable on a theory of harassment or interference with the quiet enjoyment of a dwelling, as well as constructive eviction, with regard to his conduct after the phone call. Accordingly, with regard to Respondent's conduct towards Complainant after his phone call, Respondent did not violate sections 804(f)(1) and 818 of the Act and 24 CFR 100.202, 100.60(b)(5) and 100.400(c).

b. Section 804(f)(2) of the Act

As stated above, the Government also claims that the actions taken by Respondent after "learning" of Complainant's handicap constituted different terms and conditions of tenancy in violation of section 804(f)(2) of the Act. The Government argues that after "learning" of Complainant's handicap, Respondent began treating Complainant in a different manner than he had before, and that he then treated him differently from how he treated other tenants. To bolster its argument, the Government recites in its post-hearing brief that "Laura Barber testified that respondent never made inquiries to determine her medical condition or handicap, never wrote notes to her in which he mentioned her medical condition in connection with her tenancy, never attempted to charge her for damage she did not cause to the property, and entered

[47] The *Shellhammer* theory is reminiscent of the theory of "liability beyond the risk" that is frequently illustrated by the case of the "eggshell skull", *Dulieu v. White*, [1901] 2 K.B. 669, 679. In that case, the "plaintiff" suffered death from a minor blow to the head which would have caused a normal person to suffer only a bump on the head, and the defendant was held liable. Out of this line of cases came the rule that one who negligently inflicts any personal injury upon another is to be liable for all the injury to the other which follows. However, there are limits to everything, and the limitations of this line of cases appears to be that the initial act must be negligent or harmful by its nature, or both; *e.g.*, a train leaves the tracks, a fire is set, plaintiff's head is hit. *See Prosser and Keeton on the Law of Torts* 290-93 (W.P. Keeton gen. ed. 5th ed. 1984).

her room only once without permission but stopped after she instructed him never to do it again."

Respondent has already been found in violation of section 804(f)(2) of the Act on the basis of his phone call in an earlier part of this decision.[48] The note that mentions Complainant's handicap, even had it been attributable to Williams, did not do so in connection with continuation of Complainant's tenancy but, rather, in connection with someone's having to pick up his garbage. It was not shown that a similar request would not have been made of another tenant if that tenant was not disposing of his garbage in an acceptable manner. Moreover, it was never shown that the attempt to collect for water damage was not warranted nor that the attempt would not have been made of another tenant who had allowed the water to overflow on many occasions. Furthermore, the note making the demand for payment for this damage was written and signed by Williams's wife using Williams's name. Finally, the evidence demonstrates that Williams's entry into his tenants' rooms and apartments was taking place prior to the telephone inquiry and was fairly routine, *i.e.,* not confined to Kelly's room.

The only possible difference in Kelly's treatment from that of other tenants that was put into evidence was the fact that Williams brought legal action to evict Kelly for nonpayment of rent, whereas his stated policy was to make special arrangements for people who needed to pay late. In Kelly's case, Williams made such arrangements for late payment of the June rent, which was overdue into July, after he learned of Kelly's handicap. He was also prepared to make arrangements regarding the unpaid September rent (*see* S 4), but Kelly refused to pay it at all and laughed at Williams's requests. (T 162-65). Only then did Williams commence the eviction action. Moreover, Williams has evicted two other tenants for nonpayment of rent, and the Government introduced no evidence to differentiate those evictions from that of Complainant. Indeed, those are the only known instances in which Williams has sought to evict a tenant. (D 122-28). Thus, the Government has failed to show that Respondent violated section 804(f)(2) of the Act by treating Respondent on different terms and conditions of tenancy after the phone call.

c. Section 804(c) of the Act

The Government argues that the note, discussed above, in which Respondent purportedly stated "you got AIDS and we are tired of picking up your garbage" (*see* S 9) constitutes a separate violation of section 804(c) of the Act because the note indicates a preference for tenants who do not have AIDS. The Government further argues that the other notes sent by Respondent to Complainant after the phone call, although not specifically mentioning AIDS, also reflect a hostile tone and indicate the same impermissible preference.[49]

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[48] Therefore, whether Respondent made similar inquiries of other tenants would more appropriately have been raised in connection with the arguments made in the context of the phone call as constituting an independent violation. In any event, it is noteworthy that there is no evidence of record which indicates that Respondent would not have made health-related inquiries of another similarly situated tenant if he had been told that the other tenant had a deadly and contagious disease.

[49] For example, the Government argues that S 3, the note in which Respondent wrote "Don't PLAY STUP WiTh me" and "You no what I am TALK about" refers to something other than the nonpayment of rent money because of its context in the note and its content as compared with other notes. According to the Government, this "covert" reference referred to the fact that Respondent wanted Complainant out of the house because he has AIDS. Contrary to the Government's argument, it would be pure conjecture to interpret the phrase at issue as referring in any way to Complainant's handicap.

As discussed above, the contents of the note which purportedly was written by Respondent and mentions AIDS cannot be attributed to Williams. Moreover, as also discussed above, the remainder of the notes that were not mere rent receipts contain complaints regarding actions Kelly does not deny taking and that would be objectionable to any landlord. Thus, none of the notes relied upon by the Government can be construed as showing that Williams expressed a preference for tenants who do not have AIDS in violation of section 804(c) of the Act.

D. **The Complainant's and Government's Claims Regarding Proof of Discrimination Using the Shifting Burden of Proof Analysis**

1. Williams's March 1989 Phone Call to Kelly Inquiring if Kelly Has AIDS

At the end of the Government's presentation of its case at the hearing, Respondent moved to dismiss the case on the basis of the Government's failure to prove by competent evidence that he had discriminated against Complainant on the basis of a handicap. (T 434). The Government argued against the motion on the basis of a *prima facie* case having been established. (T 434-35). The Government argued that the *prima facie* case had been established since it had proved the following elements by a preponderance of the evidence: (1) that Complainant has a handicap; (2) that Complainant was a tenant of Respondent who paid his rent on time; and (3) that Respondent learned of Complainant's handicap and immediately began a series of actions which subjected Complainant to harassment and different treatment.

As stated above, the shifting burden of proof analysis is used where there is an absence of direct evidence of discrimination. The first step of that analysis is the establishment, by the Government, of a *prima facie* case. However, proving the three elements enumerated by the Government would be more than what is needed to establish a *prima facie* case. In the second element, it is not necessary to show that the tenant's rent is being paid on time; only that he is indeed a tenant. The mere failure to pay rent on time does not authorize an "open season" of discrimination against a tenant whose rent payments are in arrears. As Patrolman DeLuccia instructed Williams, the answer to a tenant's failure to abide by the conditions of his tenancy is to bring an eviction action against him, and, as pointed out earlier in this decision, landlords may hold handicapped tenants to the same standards of performance as non-handicapped tenants. The Government's stated third element, "a series of actions" subjecting the tenant to "harassment and different treatment" also exceeds the requirements for a prima facie case. To establish the third element, the Charging Parties need only show that any adverse action was taken against the Complainant. Thus, to establish a *prima facie* case in this proceeding, the Government must prove that: (1) Complainant has a handicap, (2) Complainant is a tenant of Respondent's, and (3) Respondent took an adverse action against Complainant. *Cf. Blackwell*, Fair Housing-Fair Lending (P-H) at 25,005 (elements of *prima facie* case in action brought under Fair Housing Act alleging failure to sell property due to race of purchaser).

In its post-hearing brief, the Government states the elements it first proffered at the hearing as set forth above and argues that "this tribunal ruled [in denying Respondent's Motion to Dismiss] that the

Secretary had established a prima facie case of handicap discrimination" by proving those three elements. This was not the case. Respondent's Motion to Dismiss was denied because the Government had "at least met the burden of making a bare prima facie case." (T 445). Thus, contrary to the evident belief of the Government, it was not taken as proven at trial that Respondent, upon learning of Complainant's handicap, "immediately began a series of actions which subjected Complainant to harassment and different treatment." It was merely taken as proven that Complainant has a handicap, that he was a tenant of the Respondent's, and that Respondent took adverse action against him, *i.e.*, he made an inquiry regarding Complainant's medical condition. Thus, it was merely taken as proven that the Government established a *prima facie* case of discrimination as to the initial phone call.

Having established a *prima facie* case as to the phone inquiry, the second step of the three-part test is for the burden to shift to Respondent to articulate some legitimate, nondiscriminatory reason for the action taken. If Respondent satisfies that burden, the third step is for the burden to shift back to Complainant to demonstrate that the reason proffered is pretextual. *See Politt*, 669 F. Supp. at 175, *citing McDonnell Douglas*, 411 U.S. at 802, 804. *See also Blackwell,* Fair Housing-Fair Lending (P-H) at 25,005. In this case, the question is whether Respondent had a legitimate, nondiscriminatory reason for making the telephone inquiry to determine whether Kelly has AIDS.

Respondent's reason for the phone call was his wife's concern for the health of her children. The Government advances the argument that, because medical research has found that AIDS cannot be transmitted by casual contact, Mrs. Williams's incorrect and unfounded worry over the health of her children which caused Respondent to make the phone call, is mere pretext. As discussed above, under the particular facts of this case, Mrs. Williams's concern was not groundless. Thus, Mrs. Williams's concern was legitimate, nondiscriminatory and not pretextual. However, even with regard to her concern for the children insofar as it prompted the call, the character of the call, including its timing and the failure of the caller to assure the recipient regarding the use that adverse information would be put to, carried its nature beyond what could be justified as nondiscriminatory. Thus, Respondent's reason for the phone call must be, and is, found to be at least in part pretextual. This is in accord with the finding in section C.1. of this decision, made above, that Respondent's phone call is direct evidence of discrimination. Accordingly, there is indirect evidence of discrimination in violation of the specific statutory and regulatory sections set forth in Section C.1. of this Decision.

2. Williams's Conduct Towards Kelly After the Phone Call

As discussed above, the Government also argues that a general pattern of harassment was conducted by Respondent as a means of "driving the complainant from the property." As to those comments and actions which are evidenced by the notes, the alleged unfair charging for damages, and the action to evict Kelly, they all fail to establish the third element of the *prima facie* case for the same reasons as they were shown to fail as examples of directly-evidenced discrimination as discussed in Section C.2. of this Decision.

Remedies

Section 812(g)(3) of the Act provides that where an administrative law judge finds that a respondent has engaged in discriminatory practices, the judge shall issue an order "for such relief as may

be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or equitable relief." 42 U.S.C. Sec. 3612(g)(3). That section further states that the "order may, to vindicate the public interest, assess a civil penalty against the respondent." The maximum amount of a civil money penalty is dependent upon whether the respondent has been adjudged to have committed prior discriminatory practices. Where, as in this case, the respondent has not been adjudged to have committed any prior discriminatory practices, the civil money penalty assessed against the respondent cannot exceed $10,000. *See also* 24 CFR 104.910(b)(3) (1990).

The Government, on behalf of itself and Complainant, has prayed for: (1) damages of $16,338 to compensate Kelly for economic losses; (2) damages of $50,000 to compensate Kelly for humiliation, embarrassment, and emotional distress; (3) damages of $10,000 to compensate Kelly for loss of civil rights; (4) the imposition of a $10,000 civil penalty; (5) injunctive relief to prohibit Respondent from engaging in discriminatory practices in the future; and (6) injunctive relief in the form of record keeping, reporting practices, and monitoring requirements which would assure HUD of Respondent's compliance with the Order in this Decision and the Act.

A. **Economic Losses**

The Government's claims of economic losses are based upon Kelly's cost of looking for new housing, the cost of the move, the difference in rent, the cost of additional commuting, damages of inconvenience, and the assorted costs and inconvenience of pursuing this action. The linchpin of these damages is the Government's contention that Respondent "drove" Complainant away from his dwelling and that Respondent harassed him into leaving, thereby depriving him of his housing on the basis of handicap.

Although I have found that Respondent acted unlawfully with regard to the timing, circumstances and content of the telephone inquiry, I do not agree that Complainant was driven from his home. As discussed *supra*, the illegality the phone inquiry is the manner in which Respondent inquired of Complainant's medical condition, and there is no evidence that the actions complained of that were taken by Respondent after he inquired about Complainant's medical condition and which, purportedly, drove him away and constituted harassment, were taken as a result of that inquiry. Moreover, there is no evidence that the telephone inquiry, irrespective of those subsequent actions, played a role in Complainant's decision to vacate the premises. Indeed, well after the phone call, Complainant, with Respondent's consent, paid his June rent late. Respondent was prepared to make arrangements regarding Complainant's unpaid September rent, and commenced the eviction action only after Complainant refused to pay his September rent and laughed at Respondent's requests that he do so.[50] Thus, no award of damages for economic losses is ordered.

B. **Humiliation, Embarrassment, and Emotional Distress**

The Government seeks damages for Kelly as compensation for humiliation, embarrassment, and loss of civil rights attributed to Respondent's acts during the period of Kelly's tenancy. It is well established that the amount of compensatory damages which may be awarded in a civil rights case is not limited to money losses or other damages directly incurred, but includes intangible damages suffered as a result of the discriminatory activity. *See, e.g., Parker v. Shonfeld*, 409 F. Supp. 876, 879 (N.D. Ca. 1976). These damages can be shown by testimony and other evidence and can also be inferred from the circumstances of the case. *See Marable v. Walker,* 704 F.2d 1219, 1220 (11th Cir. 1983); *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977).

In *Blackwell,* Chief Judge Heifetz stated that "[b]ecause of the difficulty of evaluating emotional injuries which result from deprivation of civil rights, courts do not demand precise proof to support a reasonable award of damages for such injuries." Fair Housing-Fair Lending (P-H) at 25,011, *citing Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241, 1245 (8th Cir. 1983). He also found circumstances in *Marable* to be applicable to *Blackwell* and stated:

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[50] Even if the phone call was a factor in Complainant's decision to vacate the premises, his manifestation of that decision, *i.e.,* his refusal to pay his rent, was a proper ground for the eviction action ultimately taken against him by Respondent. In other words, Respondent's actions, insofar as they constituted discrimination on the basis of handicap, did not warrant Complainant's refusal to pay his rent, which was the reason Respondent sought Complainant's eviction.

> ... in *Marable, supra*, where the defendant challenged the plaintiff's claim for compensatory damages on the basis that it was based solely on mental injuries and that there was no evidence of "pecuniary loss, psychiatric disturbance, effect on social activity, or physical symptoms," the court stated:
>
> > It strikes us that these arguments may go more to the amount, rather than the fact, of damage. That the amount of damages is incapable of exact measurement does not bar recovery for the harm suffered. The plaintiff need not prove a specific loss to recover general, compensatory damages, as opposed to actual or special damages.
>
> 704 F.2d at 1220-21.

Fair Housing-Fair Lending (P-H) at 25,012.

Williams's early morning phone call to inquire regarding Kelly's medical condition contributed to the emotional distress that Kelly suffered during the period in question. He became fearful of his ability to remain at the rooming house, and believed that he was being forced out. He was embarrassed that his landlord and the other tenants had learned of his condition and felt that his privacy had been invaded.

The difficulty is determining how to asses the amount of damage attributable to embarrassment, humiliation, and emotional distress in terms that can be paid to a respondent. As recognized in *Shaw v. Cassar*, 558 F. Supp. 303, 315 (E.D. Mich. 1983), there is no formula for determining intangible damages, and consequently the determination must be left to the discretion and judgment of the trier of fact, who has great discretion but is guided by the circumstances of the particular case.[51] The key factors in ascertaining the size of such an award are the egregiousness of the respondent's behavior and the complainant's reaction to the discriminatory conduct. *See* Schwemm, *Housing Discrimination Law* 260-62. As a further general rule, while the amount of damages awarded should compensate for the injury suffered, it should not provide the injured party with a windfall. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). To that I would add that there must also be a rational relationship between what the respondent did to the complainant and how much he has been made to suffer as a consequence. *See HUD v. Guglielmi*, Fair Housing-Fair Lending (P-H) para. 25,004 at 25,078-079 (HUDALJ No. 02-89-0450-1 (Sept. 21, 1990)).

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[51] As stated in R. Schwemm, *Compensatory Damages in Federal Fair Housing Cases*, 16 Harv. C.R.C.L. Law Rev. 83 (1981):

> The federal fair housing laws became effective in 1968. Since then, courts have often awarded damages to victims of housing discrimination, but their decisions have provided little guidance for assessing the amount of such awards. There is a great range of awards, with some courts awarding only nominal damages of $1 and others setting awards of over $20,000.

(Footnotes omitted).

The Government, on behalf of Complainant, seeks $50,000 as compensation for Kelly's embarrassment, humiliation, and emotional distress. Its rationale in support of this figure is based upon its view that Respondent's behavior was egregious and that it had tremendous consequences for Complainant. According to the Government, the offending phone call was but the first step in a pattern of activity by Respondent that was intended to drive Complainant from the house. These activities, according to the Government, included notes of harassment, unauthorized entries into Complainant's room, purported interference with medications and personal papers, and the legal action taken to evict Complainant. However, only Respondent's phone call, and indeed, only the timing, circumstances and content of it, has been found violative of the Act.

The Government also argues that Respondent's activities were "devastating" to Complainant, resulting in loss of weight, difficulty eating and sleeping, tiring easily, and nervousness. However, these are all symptomatic of AIDS and, while clearly Kelly was caused some emotional distress, his deteriorating physical and emotional condition cannot in its entirety be attributed to Complainant's actions, much less to the phone call found to have been in violation of the Act.

In spite of its revealing a large range of awards, a review of decisions in which damages were assessed for violations of the Fair Housing Act has some limited usefulness in reaching a decision on intangible damages. For example, this forum awarded $40,000 for emotional distress to a couple denied the opportunity to buy a home because they are Black. *Blackwell*, Fair Housing-Fair Lending (P-H) at 25,001. The Chief ALJ also awarded $20,000 for emotional distress to a white family with whom the Respondent had entered a lease with an option to buy, to avoid selling to the black family.[52]

Recent consent orders in handicap discrimination cases brought under the Act provide further guidance. For example, in *HUD v. Purkett*, Fair Housing-Fair Lending (P-H) para. 19,372 (HUDALJ No. 09-89-1495-1 (July 31, 1990)), the manager, owner, and general partner of an apartment complex entered into an agreement to pay a tenant with a handicap $60,000 in damages in addition to injunctive and equitable relief. In *Baxter v. City of Belleville*, Fair Housing-Fair Lending (P-H) para. 19,368 (No. 89-3354 (S.D. Ill. 1989)), a municipality agreed to settle a claim of handicap discrimination, to pay the plaintiff $29,000, and to permit operation of a hospice for persons infected with the HIV virus.[53]

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[52] *See also Block*, 712 F.2d 1241 ($12,402 award for plaintiff's mental anguish, humiliation, embarrassment and stress); *Grayson v. S. Rotundi & Sons Realty Co.*, 1 Fair Housing-Fair Lending (P-H) para. 15,516 (E.D. N.Y. Sep. 5, 1984) (compensatory damage awards of $40,000 and $25,000 for two plaintiffs' embarrassment and humiliation in racial discrimination case); *Parker*, 409 F. Supp. 876 ($10,000 compensation award for embarrassment, humiliation, and anguish). *Cf. Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303 (7th Cir. 1985) (in employment discrimination case, jury award of $75,000 as compensatory damages for plaintiff's mental distress found excessive, and $35,000 awarded based on the record).

[53] *See also United States v. Oakmont Community Ass'n*, No. 89-5668 (E.D. Pa. Mar. 9, 1990) (in agreeing to settle a suit filed by the Department of Justice, respondent condominium association agreed to pay $12,500 in damages to family and $2,500 in damages to owner and managers who had rented to family, and to a $2,500 civil penalty); *United States v. Park Forest*, No. 89-630-B (S.D. Iowa C.D. May 16, 1990) (in agreeing to settle a suit filed by the Department of Justice following a HUD charge and an election to take the case to U.S. District Court by a tenant with a handicap, the managers, owners and management company of the apartment complex agreed to pay the complainant $15,000 and to other injunctive relief).

Finally, in another case involving AIDS, *Cain*, 734 F. Supp. 671, the handicapped person brought an employment discrimination action under the Pennsylvania Human Rights Statute after being discharged by his employer law firm which had learned he had AIDS. The Pennsylvania statute includes similar provisions to those in section 504 and the Fair Housing Act. In addition to an award of $50,000 in punitive damages and a large amount of back pay, the court awarded the plaintiff $65,000 for the mental anguish and humiliation attributable to the defendant's unlawful action.

Another factor which is relevant to the assessment of damages is the newness of the applicable law and regulations. *See, e.g., Guglielmi*, Fair Housing-Fair Lending (P-H) at 25,079. The effective date of the Act and regulations was March 12, 1989, and the activities complained of occurred during that following spring and summer. Indeed, the phone call for which Respondent has been found liable followed the effective date by a few weeks. While the adage that ignorance of the law is no excuse is useful at times, its application must be tempered with reasonableness. Respondent is not a large corporation but, rather, a landlord who owns a few units and runs them as a small family business. He is demonstrably inarticulate and only barely literate. In short, one cannot reasonably expect this Respondent to keep himself abreast of new items of concern published in the Federal Register.

The final factor to be considered is that the activity for which Respondent has been found in violation of the law and regulations is not one which is wrong on its face and has been so for a long time, but rather one which concerns a relatively new disease about which there is much confusion and uncertainty. Notwithstanding the expert testimony and the writings of the Surgeon General, as discussed above, concern by Mrs. Williams for her children, under the particular facts of this case, as expressed through Respondent, was not totally unfounded. Moreover, Respondent's action violated the Act and regulations because of the timing, circumstances and content of the call, rather than the making of the call itself. Thus, the egregiousness of Respondent's telephone call contrasts sharply with the situation in *Blackwell* where a family was refused an opportunity to purchase a home on the basis of race. This was an inherently evil act, widely known to have been illegal for the past 25 years, perpetrated by a real estate agent who had every reason to know better. It would simply be inequitable, under the circumstances, for the respondent in *Blackwell* and the respondent in this case to suffer equally as a consequence of what they did to their respective complainants.

Based on an application of the case law described above to the facts and circumstances of this case, I conclude that Complainant is entitled to an award of $500 from Respondent to compensate him for his humiliation, embarrassment, and emotional distress.

C. **Loss of Civil Rights**

Although this forum has, in the past, generally combined its discussion of injury through emotional distress with its discussion of loss of civil rights and, accordingly, has made combined awards of damages,[54] the Government in this case argues for separate compensation for loss of civil rights. It

[54] *See Guglielmi*, Fair Housing-Fair Lending (P-H) at 25,079; *Murphy*, Fair Housing-Fair Lending (P-H) at 25,055-057; *Blackwell*, Fair Housing-Fair Lending (P-H) at 25,014.

correctly states that a loss of civil rights is a "separate, compensable injury under the Fair Housing Act." *See Bradley v. John Branham Agency, Inc.*, 463 F. Supp. 27 (D.S.C. 1978) (plaintiff awarded $2,000 for emotional distress and $5,000 for loss of civil rights); *see also HUD v. Baumgardner*, Fair Housing-Fair Lending (P-H) para. 25,006 at 25,101 (HUDALJ No. 05-89-0306-1 (Nov. 15, 1990)). In *Baumgardner*, the complainant was awarded $500 for emotional distress and $2,500 for loss of civil rights where a real estate agent refused to rent a house to the adult male complainant and his two prospective adult male roommates. *Id.* at 25,100-01. *See also* 42 U.S.C. Sec. 3612(g)(3); 24 CFR 104.910(b).

The Government argues that courts have held that damage from the deprivation of a constitutional right can be presumed "even in the absence of evidence that the complainant has suffered any emotional distress, embarrassment, or humiliation." *See Hodge v. Seiler*, 558 F.2d 284 (5th Cir. 1977). It has also been held that the amount of compensatory damages should be adequate to redress the deprivation of a complainant's civil rights. *See Corriz v. Narajo*, 667 F.2d 892 (10th Cir. 1981). However, as mentioned before, there is also a general rule which holds that while the amount of damages awarded should compensate for the injury suffered, it should not provide the injured party with a windfall. *See Albemarle*, 422 U.S. at 418.

According to the Government, Respondent's actions "restricted Complainant's right to choose where and under what conditions he would live." The Government further urges that Respondent's actions constituted a "frontal attack on Complainant's dignity" and that he "further flouted Complainant's civil rights" by failing to cooperate with the procedures provided under the Fair Housing Act. With regard only to Respondent's early morning phone call, I find that Respondent's conduct, by its timing, circumstances and content, was an intrusion upon Complainant's privacy.

While I have found less of a violation of Complainant's civil rights than the Government has urged, a prevailing complainant who has been found to have suffered any loss of civil rights should be awarded significant damages. Such an award demonstrates that a loss of civil rights is a serious matter and will not be disregarded by this forum.

In *Baumgardner*, the respondent was found to have deprived the complainant of his right to choose his housing, and $2,500 was awarded for this deprivation of civil rights. Here, Respondent's acts were less egregiousness. Accordingly, I conclude that Complainant is entitled to an award of $500 to compensate him for the loss of his privacy.

D. **Civil Penalty**

The Government has also requested imposition of a civil penalty of $10,000, which is the maximum that can be imposed on a respondent who has not been adjudged to have committed any prior discriminatory housing practices. *See* 42 U.S.C. Sec. 3612(g)(3)(A); 24 CFR 104.910(b)(3). In addressing the factors to be considered when assessing a request for imposition of a civil penalty, the House Report at 37 states:

> The Committee intends that these civil penalties are maximum, not minimum, penalties, and are not automatic in every case. When determining the

> amount of a penalty against respondent, the ALJ should consider the nature and circumstances of the violation, the degree of culpability, and any history of prior violations, the financial circumstances of that respondent and the goal of deterrence, and other matters as justice may require.

It is useful again to compare the nature and circumstances of this case to those in *Baumgardner*. While discrimination is often subtle and difficult to show, the respondent in that case openly expressed his preference not to rent to the complainant on the basis of his sex. The respondent lied outright about the availability of the house, claiming that he was taking it off the market for his own use when in fact it remained available for rent. As to the degree of culpability, the respondent in *Baumgardner* was a real estate agent who had been in the business of renting housing for eight years and owned many rental units. As such, he knew, or should have known, that he was in violation of long-standing laws that prohibit the actions that he took; *i.e.*, there was "evidence of intentional wrongdoing". Fair Housing-Fair Lending (P-H) at 24,102. Accordingly, he was assessed a civil penalty of $4,000. Here, there is no evidence of intentional wrongdoing; only heavy handedness in making an inquiry which, under the particular facts of this case, would otherwise have been legitimate. Nonetheless, even where there is no evidence of intentional wrongdoing, it is important for the Government to deter private activity that is harmful to others.

Based upon a consideration of the factors directed by Congress, and to vindicate the public interest, I conclude that it is appropriate in this case to impose a civil penalty of $500 upon Respondent. This amount contrasts appropriately with the maximum permissible penalty of $10,000 that was imposed in *Blackwell* for an egregious case of racial discrimination and the $4,000 penalty that was imposed in *Baumgardner*. Moreover, it is in accord with the $2,000 civil penalties that were imposed in *Murphy* and *Guglielmi* where discrimination was found but there were mitigating circumstances.[55]

E. **Injunctive Relief**

Section 812(g)(3) of the Fair Housing Act also authorizes the administrative law judge to order injunctive or other equitable relief. Any injunctive relief imposed should be structured to achieve the two goals of insuring that the respondent does not violate the Act again and removing any adverse effects on the complainant of the past discrimination. *Blackwell*, Fair Housing-Fair Lending (P-H) at 25,014, *citing Marable*, 704 F.2d at 1221.

Here, the Government requests no specific injunctive relief on behalf of Complainant, but, rather, submits that injunctive and other equitable relief should be granted to further the public interest in

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[55] In *Murphy*, it was found that the respondents discriminated against families with children in an erroneous attempt to qualify for the exemption from the Act for housing for older persons set forth at 42 U.S.C. Sec. 3607(b). In *Guglielmi*, it was also found that the respondents discriminated against families with children, but for the purpose of putting into effect a vote by residents of a mobile home park to keep certain areas child free; *i.e.*, the purpose of the park rules was to protect current residents, not to discriminate, even if the latter was a consequence. Moreover, the laws and regulations prohibiting discrimination on the basis of family status took effect only days before the events complained of began to take place. Similarly, in this case, the inquiring phone call was made out of concern for Respondent's children's health, not for a discriminatory reason, and the event followed by weeks, at most, the implementation of the Act and regulations.

prevention of housing discrimination. It requests that injunctions be ordered to forbid Respondent from violating the Fair Housing Act. The Government also requests the imposition of record keeping, reporting and monitoring practice requirements to assure that Respondent complies with this forum's Order. These are granted as indicated in the Order, below.

Order

Having concluded that Respondent, Willie L. Williams, violated sections 804(f) (2) and 818 of the Fair Housing Act, which are codified at 42 U.S.C. Sections 3604(f) (2) and 3617, as well as the regulations of the U.S. Department of Housing and Urban development that are codified at 24 CFR 100.202(b) and 100.400(c)(2), it is hereby

ORDERED that,

1. Respondent, and those in active concert or participation with him shall be, and each of them is, hereby permanently enjoined from discriminating against Complainant, Ronnie L. Kelly, or anyone else, with respect to housing, because of race, color, religion, sex, familial status, national origin, or handicap.

2. Respondent shall institute the practice of requiring all applicants for rooms or apartments at any of the properties owned, operated, leased, managed, or otherwise controlled in whole or in part by Respondent to complete and submit written applications limited only to information necessary for Respondent to determine their eligibility for tenancy.

3. Respondent shall provide a written notice to all tenants and applicants that discrimination in housing on the basis of race, color, religion, sex, familial status, national origin, or handicap is unlawful and should be reported to HUD's New York Regional Office of Fair Housing and Equal Opportunity, 26 Federal Plaza, New York, N.Y. 10278-0068.

4. Respondent shall enter into written leases with all current tenants desiring to do so, and with all new tenants, starting 30 days from the date this Order becomes final.

5. Respondent shall institute internal record-keeping procedures with respect to the operation of his rental properties. These will include keeping all records described in paragraph 6, below. Respondent shall permit representatives of HUD to inspect and copy all pertinent records at reasonable times and upon reasonable notice. The representatives of HUD shall endeavor to minimize any inconvenience to Respondent from the inspection of records.

6. On the last day of every third month beginning June 30, 1991, and continuing for three years from the date this Order becomes final, Respondent shall submit reports containing the following information to HUD's New York Regional Office of Fair Housing and Equal Opportunity, 26 Federal Plaza, New York, N.Y. 10278-0068.

a. Copies of applications of all persons who applied for occupancy at any properties controlled by Respondent during the three-month period before the report with a statement of whether the person was accepted or rejected and, if rejected, the date of and reason for the rejection;

b. A list of vacancies during the reporting period at properties controlled by Respondent, including the reason(s) each tenant moved out;

c. Sample copies of any advertisements published during the reporting period, with disclosure of dates and media used or, when applicable, a statement that no advertisements have been published during the reporting period;

d. A list of all people who inquired about renting an apartment during the reporting

period, including each person's name and address, and the date and disposition of the inquiry; and

e. Sample copies of any rules, regulations, leases, or other documents provided to or signed by tenants or applicants, and any changes to any of them that are made during the reporting period.

7. Respondent shall inform all agents and employees that he employs for three years from the date this Order becomes final of the terms of the Order and shall educate them as to the terms and requirements of the Fair Housing Act.

8. Within 45 days of the date on which this Order becomes final, Respondent shall pay damages to Complainant in the amount of $500 to compensate him for humiliation, embarrassment and emotional distress.

9. Within 75 days of the date on which this Order becomes final, Respondent shall pay damages to Complainant in the amount of $500 to compensate him for loss of civil rights.

10. Within 105 days of the date on which this Order becomes final, Respondent shall pay a civil penalty of $500 to the Secretary, United States Department of Housing and Urban Development.

This Order is entered pursuant to section 812(g)(3) of the Fair Housing Act and the regulations that are codified at 24 CFR 104.910(1990). It is immediately subject to review by the Secretary of the United States Department of Housing and Urban Development under section 812(h) of the Act, and will become final and enforceable upon completion of the Secretary's review or the expiration of 30 days, whichever comes first. *See* 24 CFR 104.930.

ROBERT A. ANDRETTA
Administrative Law Judge

Dated: March 22, 1991.